SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 494

SWAYNE AND HOYT, LTD., GULF PACIFIC MAIL LINE, LTD., AND LUCKENBACH GULF STEAM SHIP COMPANY, INC., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

INDEX

	Original	Print
Record from D. C. U. S. District of Columbia	a	1
Caption (omitted in printing)	a	
Bill of complaint	1	1
Answer	13	10
Exhibit "A" Report of Shipping Board Bureau Intercoastal Investigation, 1935	23	17
Exhibit "B" Report of Shipping Board Bureau Gulf Intercoastal Contract Rates	30	25
Order of Secretary of Commerce	39	34
Opinion, per curiam	40	35
Findings of fact and conclusions of law	48	42
Final decree	54	47
Petition for appeal, assignments of error and prayer for reversal	55	48
Order allowing appeal	64	50
Citation and service (omitted in printing)	67	
Bond on appeal (omitted in printing)	68	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DEC. 15, 1936.

	Original	Print
Record from D. C. U. S., District of Columbia—Continued.		
Stipulation as to record	69	50
Order settling statement of evidence	70	51
Clerk's certificate (omitted in printing)	71	
Statement of evidence	72	52
Caption	72	52
Offers in evidence	72	52
Tariff Rule 53	73	53
Narrative statement of evidence before Examiner of Shipping Board Bureau	76	56
Testimony of J. K. Hiltner	76	56
E. M. Cole	77	57
Hugo Ignatius	78	58
M. F. Chandler	79	59
J. W. Jackson	80	59
C. Y. Roberts	80	60
Bernard Fabrikant	81	60
W. M. Hatfield	81	61
Ernest Holzborn	82	61
W. B. Rudrow	90	67
F. W. S. Locke	91	68
Exhibit 2—Letters from shippers	93	70
Exhibit 3—Excerpts from testimony	96	73
Testimony of Ernest Holzborn	96	73
C. D. Arnold	98	75
J. K. Hiltner	98	75
E. N. Cole	98	75
A. J. Ribe	99	76
Exhibit 4—Contracts by Gulf Conference lines and shippers	101	77
Exhibit 5—Gulf Intercoastal Agreement	103	80
Appendix "A"—Rules and regulations	109	85
Statement of points to be relied upon and designation of record	113	89

[fol. a] [Caption omitted]

[fol. 1]

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA, HOLDING AN EQUITY COURT

In Equity. No. 60,850

SWAYNE & HOYT, LTD. (Gulf Pacific Line), a Corporation, 620 Matson Building, San Francisco, California; Gulf Pacific Mail Line, Ltd., a Corporation, 620 Matson Building, San Francisco, California; Luckenbach Gulf Steamship Company, Inc., a Corporation, 120 Wall Street, New York City, Plaintiffs,

v.

UNITED STATES OF AMERICA, Defendant

BILL OF COMPLAINT FOR AN INJUNCTION—Filed March 4, 1936

To the Supreme Court of the District of Columbia:

The plaintiffs, Swayne & Hoyt, Ltd. (Gulf Pacific Line), Gulf Pacific Mail Line, Ltd., and Luckenbach Gulf Steamship Company, Inc., bring this action against the United States of America to enjoin, set aside, annul, and suspend a certain order of the Department of Commerce made and entered the twenty-first day of January, 1936, in a proceeding instituted by the United States Shipping Board Bureau of the Department of Commerce and designated "Gulf Intercoastal Contract Rates", being No. 294 on the docket of the Bureau.

For their cause of action plaintiffs respectfully state:

[fol. 2] I.

Parties

1. Plaintiffs Swayne & Hoyt, Ltd., Managing Owners of Gulf Pacific Line, and Gulf Pacific Mail Line, Ltd., are corporations organized and existing under the laws of the State of Nevada with their principal place of business in the Matson Building, San Francisco, California, and bring this suit in their own right and as members of the Gulf Intercoastal Conference.

2. Plaintiff Luckenbach Gulf Steamship Company, Inc., is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 120 Wall Street, New York City, and brings this suit in its own right and as a member of the Gulf Intercoastal Conference.

3. The United States of America is made defendant in this suit pursuant to the Shipping Act, 1916 (39 Stat. L. 738, c. 451, sec. 31, 46 U. S. C. A. sec. 830), and to the Judicial Code, section 208 (28 U. S. C. A. 46) and section 211 (District Court Jurisdiction Act, being part of the Urgent Deficiency Appropriations Act, approved October 22, 1913; 38 Stat. L. 219, c. 32; 28 U. S. C. A. 48).

II

Jurisdiction

4. Plaintiffs invoke the jurisdiction of this Court under the provisions of Section 207 of the Judicial Code (28 U. S. C. A., sec. 41 (28)), of the Shipping Act, 1916 (46 U. S. C. A. sec. 830), and of the Constitution of the United States, particularly Section 8 of Article I thereof, which gives to Congress the power to regulate interstate and foreign commerce.

[fol. 3]

III

Proceedings Before the Department

5. Plaintiffs are now, and have been for many years, engaged as common carriers by water between ports on the Gulf of Mexico and on the Pacific Coast via the Panama Canal. They comprise a voluntary organization known as the Gulf Intercoastal Conference for their mutual benefit and to secure to the public a more economic and satisfactory service between Gulf and Pacific ports and to the government a more dependable merchant marine.

6. The Conference was first organized about August, 1923, and was comprised of Luckenbach Steamship Company and Pacific-Caribbean and Gulf Steamship Company. The Conference collapsed about April, 1925. This collapse was followed by chaotic rate conditions lasting until the conference was again organized by agreement of August 15, 1927, between Gulf Pacific Line, Inc. (Swayne & Hoyt, Inc.),

successor to Pacific-Caribbean and Gulf Line, Luckenbach Steamship Company, Inc., Redwood Line (Finkbine-Guild Transportation Company), and Transmarine Corporation. This agreement was approved by the Board of August 23, 1927. The withdrawal of Redwood Line on March 1, 1928, and its subsequent "rate cutting tactics" brought about the second collapse of the Conference on July 1, 1928. Thereupon "a very vicious rate war resulted which greatly depleted the treasuries of all the four lines operating in the trade". This rate war continued until February 8, 1929, when the Conference was again organized by all the carriers except the Redwood Line. This agreement was filed February 12 and approved by the Board February 19, 1929. The agreement was amended on September 27, 1929, so as to permit the withdrawal of Luckenbach and admission to membership in the Conference of Luckenbach Gulf Steamship Company, Inc. This amendment was approved by the [fol. 4] Board October 9, 1929. Transmarine Corporation ceased operations late in January or early in February, 1930. On October 29, 1930, the Redwood Line again entered the Conference. Shortly thereafter that Line was taken over by the Gulf Pacific Line. This put a stop to the general rate cutting practices in the Gulf. The agreement was further amended on April 16, 1932, so as to permit admission of Gulf Pacific Mail Line, Ltd., in the Conference. This agreement was superseded by a new agreement filed January 24, 1934, and approved March 28, 1934. The purpose of the new agreement was to eliminate the Transmarine Corporation, which had ceased operating in 1930, and to show the change in the corporate names of the remaining members. The names under this last agreement were Luckenbach Gulf Steamship Company, Inc., Gulf Pacific Mail Line, Ltd., and Gulf Pacific Line (Swayne & Hoyt, Ltd., Managing Owners). So constituted, the Conference has continued in existence until the present day.

7. By Executive Order No. 6166, promulgated June 10, 1933, effective August 10, 1933, the Shipping Board was abolished and its functions transferred to the Department of Commerce (5 U. S. C. A., c. 132, sec. 12). It then became and is now known as the United States Shipping Board Bureau.

8. The members of the Gulf Intercoastal Conference, plaintiffs herein, have for several years, and do now, offer

to shippers two different sets of rates, one being applicable to shipments under a definite contract with the carrier, and the other, which is uniformly 10¢ per 100 pounds higher, being applicable to non-contract shippers. Contract rates are contained only in the westbound port-to-port tariffs and apply generally on commodities moving with regularity and in large volume. The contract is embodied in the [fol. 5] tariffs published by the Conference lines, plaintiffs herein, and filed with the Shipping Board Bureau. Contracts are available to all shippers of commodities covered by contract rates. Any shipper may obtain such rates by executing a contract. And a contract may be executed at any time. Notice is given all shippers to this effect.

9. The contract secures to the shippers a definite, fixed, maximum rate during the term of the contract, unless the Bureau orders a change, and indicates to the carriers the approximate amount of tonnage which will be shipped, thus enabling the carriers more accurately to determine in advance available cargo space and, generally, more efficiently to maintain their service. By entering into a contract a shipper does not guarantee any specified amount of tonnage.

10. The contract applies to all lines in the Conference. All lines maintaining regular service between Gulf and Pacific Coast ports belong to the Conference. By the terms of the Conference Agreement, any line regularly engaged in the trade may become a member of the Conference. At the present time, there are no regular carriers in the Gulf intercoastal trade other than the plaintiffs—members of the Gulf Intercoastal Conference. The services of all regular carriers in the trade are thus available to contract shippers. There is no pooling of revenues between the carriers. Shippers may and do elect what carrier they will use.

11. The Gulf Intercoastal Conference first published contract rates for account of its member lines on October 17, 1927, in its Westbound Contract Rate List No. 1. These rates were governed by rules of the Westbound Minimum Rate List No. 1 as amended. No minimum, but only maxi- [fol. 6] mum, tariffs were filed with the Shipping Board prior to June 1, 1933, the effective date of the Intercoastal Shipping Act of 1933. The first Conference tariff filed with

the Board and publishing contract rates was Gulf Intercoastal Conference Westbound Freight Tariff No. 1, S. B.-1. No. 1, issued May 25, 1933, to become effective June 2, 1933. Successive tariffs have published contract rates and have embodied the contract form in use and have been approved under the Act.

12. During the many years that this contract rate system has been in effect there has never been a complaint filed against it; and the Shipping Board and, later, the Department of Commerce regularly, except as hereinafter noted, accepted and approved the schedules embracing the said contract rate system.

13. In February, 1934, the United States Shipping Board Bureau of the Department of Commerce instituted an investigation into and concerning the lawfulness of practices, services and charges of intercoastal carriers relating to various phases of transportation by water, including the performance of transportation services under private contracts with shippers. This proceeding was designated "Intercoastal Investigation" and became No. 126 on the docket of the Bureau. Public hearings were held; briefs were filed; the examiner submitted a proposed report; and plaintiffs, among others, filed exceptions to the said report and requested the privilege of oral argument. No oral argument was permitted.

14. During the entire course of the said "Intercoastal Investigation", the Shipping Board Bureau could produce but one shipper in opposition to the contract rate system in question.

15. Thereafter, on July 3, 1935, the Department of Commerce rendered its decision in the form of a voluminous report containing its conclusions, and issued an order which, inter alia, provided—

[fol. 7] "That respondents Gulf Pacific Mail Line, Ltd., Luckenbach Gulf Steamship Company, Inc., and Swayne & Hoyt, Ltd., each be, and it is hereby, notified and required to cease and desist, on or before October 3, 1935, and thereafter to abstain, from publishing, exacting, demanding, charging, or collecting, for intercoastal transportation of property from points on the Gulf of Mexico to points on the Pacific Coast which it serves, rates or charges

higher or different from consignors or consignees who have not executed rate contract or contracts with it than those contemporaneously maintained by it for intercoastal transportation of property of consignors or consignees who have executed such rate contract or contracts with it."

16. The contract rates in effect at the time of the order of July 3rd were to expire on October 2, 1935. On or about September 2, 1935, by schedules filed to become effective October 3, 1935, plaintiffs herein filed a new tariff for their Westbound service in which they continued the contract rate system. Prior to the filing of that tariff, they had filed in this Honorable Court a bill in equity asking the Court to enjoin, set aside, annul and suspend the said order of the Department of Commerce.

17. On or about September 16, 1935, the Department of Commerce vacated its order of July 3, 1935, requiring these plaintiffs to abstain from maintaining the contract rate system after October 3, 1935. Simultaneously, the Department of Commerce, by Suspension Order No. 50, suspended, until February 3, 1936, the contract rates of these plaintiffs as published in their tariff to become effective on October 3, 1935, and ordered a hearing concerning the lawfulness of the rates, charges, regulations, practices and schedules as contained in said tariff. These proceedings were designated "Gulf Intercoastal Contract Rates" and given Docket No. 294.

18. When plaintiffs herein were notified by the Secretary of Commerce on or about September 13, 1935, that the Department intended to vacate its order of July 3, 1935, they dismissed the suit in equity which they had filed in this Court.

19. A hearing was held, pursuant to the said order of [fol. 8] suspension, before the Chief Examiner of the United States Shipping Board Bureau, Department of Commerce, in New York City on October 22 and 23, 1935. Documentary evidence from 219 shippers representing more than 37% of the contractable tonnage handled by the plaintiffs was offered and accepted in favor of the contract rate system. Six individuals representing large shippers appeared in person and testified in favor of the system.

20. At the said hearing only one shipper testified against the contract rate system, and the tonnage carried for him was infinitesimal. He had been compelled by order of the United States Shipping Board to pay a higher rate on one of his shipments because he had failed to renew his contract.

21. On January 21, 1936, the Department of Commerce issued its report accompanied by an order requiring plaintiffs herein to cancel the contract rates as contained in its tariff of October 3, 1935, and to cancel such schedules on or before February 3, 1936, upon not less than one day's posting and filing.

22. On January 30, 1936, plaintiffs herein petitioned the Department of Commerce to reconsider its order requiring them to cancel the contract rates on or before February 3, 1936, but said petition was denied on February 1, 1936, by order of the Secretary of Commerce.

23. On January 31, 1936, plaintiffs herein petitioned the Department of Commerce to postpone until April 1, 1936, the effective date of its said order cancelling the contract rates, and on February 1, 1936, the Department modified its said order to become effective April 1, 1936.

IV

Grounds for Relief

24. The finding of the Department that the real purpose of the suspended rates and rule is to prevent shippers from [fol. 9] using the lines of other carriers and to discourage all others from attempting to engage in intercoastal transportation from and to the Gulf is not supported by the evidence.

25. The finding of the Department that the contract rate system in question is not justified by transportation conditions in the trade involved is not supported by the evidence but is contrary thereto.

26. The finding of the Department that the contract rate system in question is unduly and unreasonably preferential and prejudicial in violation of section 16 of the Shipping Act, 1916, is not supported by the evidence but is contrary thereto.

27. The contract rate system in question neither directly nor indirectly makes or gives any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or subjects any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

28. The contract rate system in question is a just and reasonable practice, meeting the needs and having the approval of shippers and carriers alike.

29. The contract rate system in question is not a new practice, but has for many years been accepted and approved by the Shipping Board and, more recently, by the Department of Commerce.

30. The said order of the Department of January 21, 1936, is unlawful and void because—

(a) It contravenes the very purpose of the Shipping Act.

(b) It is arbitrary in that it is not supported by the evidence, but is contrary thereto.

[fol. 10] (c) It represents a misapplication of the law to the facts.

(d) It will jeopardize, if not destroy, the stability of rates and service which has for many years been sanctioned by the Shipping Board and, more recently, by the Department of Commerce and enjoyed both by shippers and carriers in the Gulf inter-coastal trade.

(e) It will discriminate against regular carriers, such as plaintiffs herein, and in favor of occasional or irregular carriers.

31. Executive Order No. 6166, promulgated June 10, 1933, effective August 10, 1933, abolishing the Shipping Board and transferring its functions to the Department of Commerce, was promulgated without authority of law and, therefore, is null and void. The Secretary of Commerce and the Department of Commerce have no authority whatsoever in the premises.

V

Prayer for Relief

Wherefore, plaintiffs pray:

(a) That a subpœna or subpœnas in Chancery issue directed to the defendant herein, as required by law, and that due and proper service of such process and of this bill be forthwith made by filing a copy hereof in the Department of Justice, and another copy in the office of the Secretary of Commerce, pursuant to the provisions of Section 209 of the Judicial Code (28 U. S. C. A. 45), and that thereafter the defendant be required, on or before a date to be specified in such subpœna or notice, to appear herein and answer this bill, but not under oath, answer under oath being hereby expressly waived;

(b) That, as soon as practicable, this Court convene a special statutory court of three judges as required by the [fol. 11] said District Court Jurisdiction Act (28 U. S. C. A. 47), and that a preliminary injunction be entered herein restraining, enjoining and suspending the operation of the said order of January 21, 1936, until the further order of this Court;

(c) That, pending the hearing upon the application for a preliminary injunction, a temporary restraining order be issued restraining, enjoining, and suspending the operation of the said order until the said application for a preliminary injunction shall have been heard and determined;

(d) That after final hearing this Court adjudge, order and decree that the said order is and has been at all times unlawful and wholly void, and that it be perpetually set aside, suspended, cancelled, and rescinded, and that the enforcement thereof be perpetually enjoined; and

(e) That plaintiffs may have such other and further relief as the nature of the case may require and as the Court may deem equitable and proper.

Swayne & Hoyt, Ltd., (Gulf Pacific Line), Gulf Pacific Mail Line, Ltd., Luckenbach Gulf Steamship Company, Inc., by Elisha Hanson, Eliot C. Lovett, Frank Lyon, Attorneys for Plaintiffs.

[fol. 12] *Duly sworn to by Elisha Hanson. Jurat omitted in printing.*

[fol. 13] IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA—Filed April 1, 1936

Now comes the United States of America, defendant in the above entitled cause, by Leslie C. Garnett, United States Attorney in and for the District of Columbia, and for answer to the bill of complaint herein filed, or to such part or parts thereof as it is advised it is necessary for it to make answer, answers and says:

1-3. The defendant admits, for the purpose of this suit, the allegations contained in paragraphs 1, 2 and 3 of said bill of complaint, except that the defendant denies that said plaintiffs have any standing or capacity to institute and maintain this suit "as members of the Gulf Intercoastal Conference".

[fol. 14] 4. Defendant is advised that no answer is required of it to the paragraph numbered 4 of said bill of complaint.

5. Defendant admits, in answer to the allegations contained in paragraph 5 of the bill of complaint, that the plaintiffs have, for a number of years, and are now engaged as common carriers by water between ports of the Gulf of Mexico and ports on the Pacific coast via the Panama Canal and that they are members of a voluntary organization known as the Gulf Intercoastal Conference. Defendant avers that the Conference agreement, under which the said Gulf Intercoastal Conference operates, was duly filed and approved by the Secretary of Commerce in accordance with the provisions of section 15 of Shipping Act, 1916 (46 U. S. C., sec. 814).

6. Defendant admits the allegations contained in paragraph numbered 6 of the bill of complaint.

7. In answer to the allegations contained in paragraph 7 of the bill of complaint, defendant admits that the President, acting in accordance with authority so to do granted by Act of Congress June 30, 1932, as amended March 3, 1933 (5 U. S. C., sec. 124, et seq.), promulgated an Executive Order, No. 6166, on June 10, 1933, effective August 10, 1933,

whereby and whereunder the United States Shipping Board was abolished and its functions transferred to the Department of Commerce. Defendant avers that the Secretary of Commerce, subsequent to the effective date of said Executive Order, established the United States Shipping Board Bureau within the Department of Commerce.

8. Defendant admits that the plaintiffs herein as members of the Gulf Intercoastal Conference have for an extended period in the past offered to shippers two different sets of rates applicable to westbound movement of certain commodities from ports in the Gulf District to Pacific coast ports. One set of rates was the general tariff for trans- [fol. 15] porting the commodities westbound from ports located in the Gulf to ports on the Pacific coast. The other set of rates was the contract rates which were 10¢ per hundred pounds or $2.00 per ton of 2,000 pounds less than the general rate for the same service. A shipper of any of the commodities on the contract list could only avail himself of the lower rate by signing a contract with the Conference as agent for the member lines, agreeing to use those lines exclusively for a fixed period of a year or six months in shipping the named commodity or commodities westbound from ports in the Gulf District. The contract did not require the shipper to ship any specific amount of cargo during the period, but limited the shipper to use the Conference lines exclusively for any of the enumerated cargo he might have moving from the Gulf ports. The commodities which carried the contract rates comprised approximately 63.7 per cent of the total westbound port-to-port tonnage that was offered by shippers. 99 per cent of the tonnage to which the contract rates applied moved under contract rates and only one per cent moved under the general rates because the shippers thereof had refused, neglected or failed to sign contracts. Subsequent to May 25, 1933, the Conference published both sets of rates and filed the same with the United States Shipping Board Bureau. The practice of offering two sets of rates has been suspended since October 3, 1935, the effective date of an order issued by the Secretary of Commerce requiring that the practice be suspended pending a determination of the lawfulness of the practice. Your defendant is informed, believes, and therefore avers that since October 3, 1935, the plaintiffs have charged and collected, for transporting commodities cov-

ered by contract rates, the contract rates without regard to the existence of a contract.

9. Answering the allegations of fact and conclusions contained in paragraph 9 of the bill of complaint, defendant [fol. 16] submits that the contract referred to therein is the best evidence of its terms, conditions and provisions and respectfully refers to said contract therefor. Defendant avers that the existence of the contracts enables the carriers to tie up by contract the great proportion of traffic moving westbound from the Gulf ports on port-to-port rates and thus prevent any other common carrier from establishing and maintaining a service in competition with that of plaintiffs.

10. Answering the statements of facts and conclusions contained in paragraph numbered 10, defendant avers that the contract and agreement mentioned therein are the best evidence of their scope, terms, application and conditions and respectfully refers to the same for the terms thereof. Defendant admits that all lines maintaining a regular service between Gulf and Pacific coast ports at the time the petition herein was filed belonged to the Conference and that there were then no regular carriers in the Gulf intercoastal trade, other than the plaintiffs, who are not members of that Conference. Defendant avers that the existence of the practice of maintaining the so-called contract rates is an active factor in preventing other established lines from attempting to establish and maintain a regular service between Gulf and Pacific coast ports and that by the rules of the Conference no other line can become a member of the Conference until it has proved to the satisfaction of the members thereof that the applicant has established and is maintaining a regular service between the Gulf and Pacific coast ports. The defendant further avers that by means of the devices of the Gulf Intercoastal Conference, together with the contract rate system, plaintiffs have established a virtual monopoly of the service. Defendant admits there is no pooling of revenue between the carriers who are members of the Gulf-Intercoastal Confer- [fol. 17] ence. Except as admitted herein, the statements of fact contained in paragraph 10 are denied.

11. Defendant admits the allegations contained in paragraph 11 of the bill of complaint, except that defendant has

no knowledge as to when the contract rates were first published and demands strict proof thereof and denies that the tariffs published by plaintiffs have been approved under the Act.

12. Defendant has not sufficient information to form a belief in answer to the first statement contained in paragraph 12 and puts the plaintiffs to proof thereof. Defendant denies that the Shipping Board, and later the Department of Commerce, approved the schedules embracing the said contract rate system.

13-15. Answering paragraphs 13 to 15 of said bill of complaint, defendant admits that on February 19, 1934, the United States Shipping Board Bureau of the Department of Commerce by order of the Secretary of Commerce on his own motion instituted an investigation into and concerning the lawfulness of practices, services, and charges made by intercoastal carriers in connection with various phases of transportation by water; that said proceeding was designated "Intercoastal Investigation" and became No. 126 on the Docket of the Bureau; that the investigation included an investigation of the practices of intercoastal services entering into private contracts with shippers at different rates than those charged other shippers; that a large number of common carriers by water, including the plaintiffs herein, were made respondents in said proceedings; that hearings were had in which respondents, including the plaintiffs herein, participated and were afforded an opportunity to and did submit evidence on the issues involved, including the particular questions raised in this suit; that in said proceeding a large volume of testimony was taken and other evidence bearing on the matters and things [fol. 18] which were the subject of the inquiry and investigations; that thereupon said Bureau made and served upon the parties thereto, including the plaintiffs herein, its proposed report containing its findings and conclusions and the parties, including the plaintiffs herein, were given an opportunity to file exceptions thereto and briefs in support of their exceptions. Plaintiffs herein filed exceptions to said report and briefs in support thereof. The Secretary of Commerce approved said findings and conclusions and directed the entry of appropriate orders consistent therewith. Thereupon said Secretary of Commerce issued an order,

dated July 3, 1935, and the same was served upon respondents in said proceeding, including the plaintiffs herein. A copy of such parts of said report, including the findings and conclusions, as are applicable to the present suit are hereto attached, marked Exhibit A, and made a part of this answer and the Court is respectfully referred thereto for full and complete information as to the scope of the investigation and as to the statements, findings and conclusions made therein. Defendant admits that an order was issued by the Secretary of Commerce as set out in paragraph 15, but avers that said order, as will appear hereafter, is not the order which the plaintiffs are asking herein to set aside.

16. The allegations contained in paragraph 16 of the bill of complaint are admitted

17. The allegations contained in paragraph 17 of the bill of complaint are admitted.

18. The allegations contained in paragraph 18 of the bill of complaint are admitted.

19-20. In answer to the allegations contained in paragraphs 19 and 20 of the bill of complaint, defendant admits and avers that a hearing was held by the United States Shipping Board Bureau pursuant to said order of suspension on October 22 and 23, 1935, at which hearing the plaintiffs herein were afforded every opportunity to and did [fol. 19] submit evidence on the issues involved; that a large volume of testimony was taken and other evidence received both for and against the continuance of said contract rate practice and bearing on the matters and things which were the subject of the inquiry and investigation; that thereupon said Bureau made and served upon the plaintiffs its proposed report containing its findings and conclusions, and gave plaintiffs an opportunity to file exceptions thereto and briefs in support thereof. Plaintiffs did file exceptions to said report and briefs in support of said exceptions. On January 21, 1936, the Secretary of Commerce approved said findings and conclusions and issued his order of same date, a copy of which, together with the conclusions and findings, is hereto attached and made a part hereof, marked Exhibit "B". A copy of said order was duly served upon the plaintiffs herein. Defendant further avers that the findings and conclusions in said report were

and are, and each of them was and is, fully supported and justified by the evidence submitted in said investigation and proceeding held by the said Bureau; that in making said report the said Bureau considered and weighed carefully each fact, circumstance and condition called to its attention on behalf of plaintiffs herein, including all material matters covered by the allegations of the bill of complaint herein, as did the Secretary of Commerce upon consideration of and decision on the exceptions to the report and in making and directing the issuance of said order; that the said order of January 21, 1936, was not made or issued either arbitrarily or unjustly or contrary to the relevant evidence or without evidence to support it, and in making the said order the Secretary of Commerce did not exceed the duty and authority which had been lawfully conferred upon him. Defendant avers that the plaintiffs have not set forth all of the evidence which was submitted at said hearing, and [fol. 20] defendant further avers that there were three shippers who entered protests with the plaintiffs against the said contract system and that two other lines, which were established in intercoastal service between the Atlantic and Pacific coast ports, appeared and offered evidence against the said contract system. Except as admitted herein, defendant denies each and every allegation contained in said paragraphs.

21-23. Defendant admits the allegations contained in paragraphs 21 to 23, inclusive, of the bill of complaint.

24. Defendant denies the conclusions contained in paragraph 24 of the bill of complaint.

25. Defendant denies the conclusions contained in paragraph 25 and refers to the averments contained in paragraph 19-20 of this answer.

26. Defendant denies the conclusions contained in paragraph 26 of the bill of complaint and refers to averments in paragraph 19-20 of this answer.

27. Defendant denies the conclusions contained in paragraph 27 of the bill of complaint.

28. Defendant denies the conclusions contained in paragraph 28 of the bill of complaint.

29. Defendant admits that the contract rate system in question is not a new practice, but denies that it has ever

been approved by the Shipping Board, or more recently by the Department of Commerce, as applied to Intercoastal service and to circumstances obtaining in this litigation.

30. Defendant denies the conclusions contained in paragraph 30 of the bill of complaint.

31. Defendant is informed that it is not required to answer the conclusions of law contained in paragraph 31 of [fol. 21] the said bill of complaint. Defendant respectfully refers to the allegations contained in paragraph 7 of the bill of complaint and paragraph 7 of this answer for the authority upon which the Secretary of Commerce acted in issuing the said order and for the statutory authority upon which the President of the United States acted in issuing the said Executive Order.

Except as herein expressly admitted, defendant denies the truth of each and every allegation contained in the bill of complaint in so far as they conflict either with the allegations herein or with either the statements or conclusions of fact included in said report of January 21, 1936, and the order of January 21, 1936.

All of which matters and things defendant is ready to aver, maintain and prove as this Honorable Court shall direct, and the defendant prays that the bill of complaint be dismissed at plaintiffs' cost.

United States of America, by Leslie C. Garnett, United States Attorney. H. L. Underwood, Assistant United States Attorney. R. H. Hallett, Attorney, United States Shipping Board Bureau, Of Counsel.

[fol. 22] *Duly sworn to by Harry S. Brown. Jurat omitted in printing.*

[fol. 23] EXHIBIT "A" TO ANSWER

Department of Commerce,

United States Shipping Board Bureau

No. 126

Intercoastal Investigation, 1935

Submitted May 25, 1935. Decided July 3, 1935

* * * * * * *

9. Practice of members of Gulf Intercoastal Conference to exact higher rates and charges from shippers who have not executed rate contracts than from shippers who have done so, for like intercoastal transportation, found unlawful in violation of sections 16 and 18 of Shipping Act, 1916, and respondents required to cease and desist from said unlawful practice.

* * * * * * *

Elisha Hanson, Frank Lyon, C. W. Cook, E. Holzborn, and C. Y. Roberts for carriers members of Gulf Intercoastal Conference.

* * * * * * *

Report of the Department

This proceeding, instituted by the department upon representations that common carriers by water in intercoastal commerce are not fully complying with the provisions of law, is an investigation into and concerning the lawfulness of the practices, services, and charges of such carriers relating to or concerning * * * (k) performance of transportation services, or services in connection therewith, under private contracts with shippers; * * *

All common carriers by water parties to tariffs on file with the department naming rates for transportation of property in intercoastal commerce were made respondents in the proceeding. Public hearings were held in New York, N. Y., San Francisco, Cal.; and New Orleans, La. Testimony was given by many witnesses, including representa-

tives of respondents, shippers, manufacturers, terminal companies, port authorities, chambers of commerce, and traffic associations. * * * The evidence, which includes returns to questionnaires calling for financial and statistical information not practicable of development in oral form, has been generally frank and full and the record fairly presents the existing situation as to each of the subjects of investigation. * * *

General Situation

The term "common carrier by water in intercoastal com- [fol. 24] merce" as used in the Intercoastal Shipping Act, 1933, includes every common and contract carrier by water engaged in the transportation for hire of property between one state of the United States and any other state of the United States by way of the Panama Canal. Although transportation by water between points on the Atlantic and points on the Pacific coasts of the United States is not of recent origin, intercoastal commerce as known at present owes its development to the building of the Panama Canal. However, not until after a large fleet built by the government during the war period was made available to private operators in 1920, and a subsequent decrease in foreign commerce, did vessels in large number enter and remain in the intercoastal trade. The table below shows the number of vessels and their deadweight tonnage operated or available for operation in the intercoastal trade at July 1, 1934, by American-Hawaiian Steamship Company and other respondents which maintain direct service between points on the Atlantic Coast or Gulf of Mexico and points on the Pacific Coast. It does not include vessels of on carriers, that is, respondents interchanging freight in intercoastal commerce but the vessels of which do not go through the Panama Canal.

Name	Number of Vessels	Aggregate Deadweight Tonnage
American-Hawaiian	22	207,032
Panama Pacific	5	79,440
Argonaut	8	74,646
Calmar	12	109,114
Dollar	16	207,100
Gulf Pacific	10	66,890

Name	Number of Vessels	Aggregate Deadweight Tonnage
Gulf Pacific Mail	4	39,000
Isthmian	28	200,320
Luckenbach Gulf	6	60,000
Luckenbach	22	203,663
McCormick	5	64,602
Nelson	14	90,904
Quaker	17	153,720
Pacific Coast Direct	4	47,000
Grace	8	91,400
Shepard	4	34,761
Arrow	6	51,082
Weyerhaeuser	4	47,000
Williams	7	67,760
Total	204	1,808,402

Pacific Coast Direct only operates westbound and Weyerhaeuser in the opposite direction. The 4 vessels operated by one westbound are the same vessels operated by the other eastbound. This reduces the total number of vessels shown in the table to 200 and the aggregate dead weight tonnage to 1,808,402. Two of the vessels of American Hawaiian are motorships.

[fol 25] Respondents generally compete with each other and with rail carriers. This competition, always intense and bitter, has not been conducted along lines of benefit to the general shipping public, or to respondents themselves, or to the maintenance of an adequate merchant marine. The trade is characterized by individualistic operations and, as hereinafter will be shown, in their struggle for traffic respondents have gone beyond the limits permitted by law. This investigation was instituted with a view to making such corrections as might be deemed desirable.

Cooperative Agreements—Conferences

When the intercoastal trade assumed larger proportions, to stop if possible the existing demoralization and to obtain some degree of stability in the rates, much demanded by shippers and carriers alike, some of the principal carriers in the trade voluntarily associated themselves in two groups or conferences, permitted by section 15 of the Shipping

Act, 1916. These groups seem to have followed geographical lines. One, known as United States Intercoastal Conference, was organized in 1920 by carriers operating between Atlantic and Pacific coast points. The other, known as Gulf Intercoastal Conference, was organized about 1923 by carriers operating between Gulf of Mexico and Pacific Coast points.

* * * * * * *

Gulf Intercoastal Conference.—The history of this conference is not very clear. It seems that Pacific Caribbean Gulf Line was the first to operate in the Gulf-Pacific Branch of the intercoastal trade. It commenced operations about August 1920. American-Hawaiian followed shortly thereafter but for a brief period. Luckenbach, in 1921, was the next line to enter that service. Contemporaneously Luckenbach was a member of United States Intercoastal Conference and cooperated with Pacific Caribbean Gulf Line to maintain from and to the Gulf approximately the rate level maintained by that conference. This situation existed until the two lines organized the Gulf Intercoastal Conference about August 1923. The unsettled rate situation existing on the Atlantic-Pacific branch of the intercoastal trade made itself felt in the Gulf, and for that reason and others of its own the Gulf conference collapsed about April 1925. This collapse was followed by chaotic rate conditions lasting until the conference was again organized by agreement of August 15, 1927, between Gulf Pacific, successor to Pacific Caribbean Gulf Line, Luckenbach, Redwood Steamship Company and Transmarine Corporation. The withdrawal of Redwood Steamship Company on March 1, 1928, and its subsequent "rate cutting tactics" brought about the second collapse of the conference. The record shows that thereupon "a very vicious rate war resulted which greatly depleted the treasuries of all the four lines operating in the trade". This rate war continued until February 8, 1929, when the conference was again organized by all the carriers except Redwood Steamship Company. The organic agreement was amended on September 27, 1929, so as to permit the withdrawal of Luckenbach and the membership in the conference of Luckenbach Gulf. Transmarine Corporation ceased operations late in January or early in February [fol. 26] 1930. On October 29, 1930, Redwood Steamship Company again entered the conference. Shortly thereafter

that line was taken over by Gulf Pacific. This is said to have put a stop to the general rate cutting practices in the Gulf. The agreement was further amended on April 16, 1932, so as to permit admission of Gulf Pacific Mail in the conference. Thus constituted by Gulf Pacific, Luckenbach Gulf, and Gulf Pacific Mail but under a new agreement filed with the department on January 22, 1934, amended February 20, 1934, the conference has continued in existence. Gulf Pacific Mail has no vote in the conference. It operates under a mail contract, Route No. 55, from Seattle, Wash., to Tampico, Mexico. Its vessels return to Pacific Coast under charter to Gulf Pacific. Unlike carriers in the United States Intercoastal Conference, carriers in the Gulf conference have always maintained uniform rates, have never provided for pooling of their revenues, nor for port equalization. Some time ago Gulf Pacific and Luckenbach entered into an agreement whereby the sailings of the two lines are staggered and thus maintain coordinated weekly service from the principal Gulf ports.

The various subjects of the investigation and the chartering of vessels to shippers for the intercoastal transportation of property will now be taken up in the order stated.

* * * * * * *

(k) Performance of Transportation Services, or services in Connection Therewith, under Private Contracts with Shippers

No. 121

The record does not show carriers formerly members of the United States Intercoastal Conference maintain contracts with shippers in respect of their rates. The contract rate system was adopted by members of the Gulf conference, Calmar and Shepard prior to the passage of the Intercoastal Shipping Act, 1933, when Intercoastal carriers were only required to file their maximum rates and the rates charged the shippers, which frequently changed, were not the same as the published rates. Such practice only prevails in respect of west-bound rates. Members of the Gulf conference publish what are termed "tariff rates" and "contract rates". As both rates are published in the same tariff, these terms are misleading. The contract rate invariably is lower than the noncontract rate. At the time of hearing there was no uniformity in the difference be-

tween such rates. The applicable tariff has been amended, and at present the contract rates are uniformly 10 cents per 100 pounds, or $2 per ton, less than the noncontract rates. Westbound traffic from the Gulf moves under through all-water rates with barge lines, rail-ocean rates, rail-barge-ocean rates, and port-to-port or terminal rates. Contract rates are contained only in the port-to-port tariff, SB-I No. 2, filed by Agent C. Y. Roberts on behalf of Gulf Pacific, Gulf Pacific Mail and Luckenbach Gulf, and only on commodities moving with regularity and in large volumes. It is estimated that from 65 to 70 percent of such westbound tonnage moves on basis of contract rates.

[fol. 27] In addition to the contract rate the tariff contains the form of the contract, which in part reads as follows:

1. The Shipper, * * * agrees to ship by steamers of the Gulf Intercoastal Conference lines, * * * all of the waterborne shipments, which the Shipper shall make between the date hereof and ——, inclusive, * * * of the commodities, hereinafter described, quantities being estimated at approximately — carloads of — net tons.

The shipments contemplated in this clause shall include not only any such shipments made directly by the Shipper and in its name, but also any such shipments, however, and by whomsoever made, if for the benefit and on behalf of the Shipper * * *.

4. If the Shipper shall make any shipments in violation hereof, this agreement shall immediately become null and void as to all future shipments, and thereupon the Shipper shall be liable to the transporting Carriers for payment of additional freight on all commodities theretofore shipped with such Carriers since the execution of this agreement, in the amount of the difference between the tariff contract rate or rates and the tariff noncontract rate or rates of the transporting carriers in force on such commodities at the time of such shipments.

6. * * *

For and on behalf of the Carriers:

Gulf Pacific Line, Gulf Pacific Mail Line, Ltd., Luckenbach Gulf Steamship Company, Inc., by Gulf Intercoastal Conference, by —— ——.

The contracts, executed generally for 6 months or one year, are renewed upon expiration. The tariff shows the

present contract rates and contract items to expire June 30, 1935.

An underlying purpose of the Shipping Act, 1916, is to prevent every form of favoritism based upon the relations of the shipper with the carrier as a customer and to place all shippers, the large and small, the steady and occasional, upon a plane of equality in the right of service. For this reason that act condemns and makes unlawful every regulation, device, or subterfuge which undertakes to give to anyone an advantage based upon conditions other than those inhering to the transportation itself and alone. Contracts of the character in question do not constitute a transportation condition as to warrant a difference in transportation rates. Furthermore carriers are not justified in attempting to restrict traffic to move over their lines. As stated in Menacho v. Ward, 27 Fed. 529, involving a substantially similar situation, cited in Eden Mining Co. v. Bluefields Fruit & S. S. Co., 1 U. S. S. B. 41—

[fol. 28] The vice of discrimination here is that it is calculated to coerce all those who have occasion to employ common carriers * * * from employing such agencies as may offer. * * * If it is tolerated it will result practically in giving the defendants a monopoly of the carrying trade between these places. Manifestly it is enforced by the defendants in order to discourage all others from attempting to serve the public as carriers between these places. Such discrimination is not only unreasonable, but is odious.

It is said the contract rate system was adopted to obtain some degree of stability in the rates. Undoubtedly this was one of its effects, at least as to the rates on shipments of contracting shippers, but another effect of this practice is to exclude other carriers as may offer from participating in the transportation of the contracted tonnage. In the Eden Mining case it was held that the exaction of higher rates from complainants than from shippers who had agreed to give the respondent their exclusive patronage subjected complainants to undue and unreasonable prejudice and disadvantage, and constituted unjust discrimination between shippers. It is true only one carrier was there involved, but to permit the members of the Gulf conference to publish and charge rates depending upon the execution of exclusive patronage contracts would be permitting them to

do collectively what carriers individually are prohibited from doing. Two carriers were involved in the Menacho case and in principle the situation as to the Gulf carriers cannot be distinguished from the one there involved.

* * * * * * *

By the Secretary of Commerce:

Except as to certain unimportant changes the foregoing is the report of the examiner who heard the case and proposed the following conclusions:

* * * * * * *

(9) That the practice of members of Gulf Intercoastal Conference to exact higher rates and charges from shippers who have not executed so-called rate contracts with them than from the shippers who have done so, for like intercoastal transportation, is unlawful, in violation of sections 16 and 18 of the Shipping Act, 1916, and such respondents should be required to cease and desist from such unlawful practice.

* * * * * * *

The report was served upon the parties. Exceptions were filed thereto by some respondents and some interveners. No mistake of fact is alleged or shown.

* * * * * * *

[fol. 29] The ninth conclusion was excepted to by American Line Steamship Corporation, Luckenbach Gulf Steamship Company, Inc., Swayne & Hoyt, Ltd., and Gulf Pacific Mail Line, Ltd. They are based principally on the effect such conclusion will have on transportation in foreign commerce, on the ground no strong opposition was made of record to the contract rate system, and that such system was approved in Rawleigh v. Stoomvaart et al., 1 U. S. S. B. 285, to which case no reference is made in the report. It is notorious that intercoastal transportation is not attended by many of the traffic and transportation circumstances attending transportation in foreign commerce, and from the report it is clear that the finding and conclusion therein contained relate to intercoastal transportation and not to transportation in foreign commerce. The Rawleigh case in-

volved transportation in foreign commerce, the issues there are distinguishable from the issues here, and that decision should have no controlling effect on intercoastal transportation. The fact that no strong opposition was made of record is not a defense.

* * * * * * * * *

On consideration of all the facts and circumstances of record, including the exceptions, the department adopts as its own the report and conclusions of the examiner. However, appropriate orders will be entered requiring * * *; requiring members of Gulf Intercoastal Conference each to cease and desist from the unlawful practice of exacting higher rates and charges from shippers who have not executed rate contracts with it than from shippers who have done so for like intercoastal transportation; * * *

[fol. 30] EXHIBIT "B" TO ANSWER

Department of Commerce,

U. S. Shipping Board Bureau

No. 294

Gulf Intercoastal Contract Rates

Submitted November 20, 1935. Decided January 21, 1936

Proposed Contract Rate System for Intercoastal Transportation of Certain Commodities from Points on the Gulf of Mexico to Points on the Pacific Coast Found Not Justified and Unlawful. Suspended Schedules Ordered Canceled

Elisha Hanson and Frank Lyon for respondents.

Edmund J. Karr, J. E. Bishop, F. W. S. Locke, J. C. Stern, J. A. Stumpf, W. S. McPherson, A. D. Whittemore, J. A. Hart, C. J. Maley, W. M. Hatfield, Alfred H. Caterson, Jr., J. W. Jackson, G. A. Dundon, M. F. Chandler, J. P. Daly, E. M. Cole, J. K. Hiltner, Hugo Ignatius, H. W. Wagner, W. P. Rudrow, and Bernard Fabrikant for other interested parties.

Report of the Department

By the Secretary of Commerce:

By schedules filed to become effective October 3, 1935, carriers parties to Agent Roberts' SB-I No. 3 proposed to establish and maintain rates for transportation of certain commodities from points on the Gulf of Mexico to points on the Pacific Coast, conditioned upon the execution of contracts by shippers, in the following form:

[fol. 31] Procedure in Connection with Execution of Contracts at Contract Rates

(a) Where specific reference is made to this rule in individual commodity items in this tariff, the rates named in such items are contract rates and in the absence of contracts as provided for in this rule, the rates on such commodities will be ten cents per one hundred pounds or two dollars per ton of two thousand pounds higher than the rates named in such items.

Contract rates as provided herein may be secured by any shipper or consignee subject to joint execution by shipper or consignee on the one hand and the Gulf Intercoastal Conference for and on behalf of named carriers on the other of term contract, in the form indicated in Section (c) hereof, applying from specific ports of loading to specific ports of discharge, such contract signed by the shipper or consignee to be transmitted by him to the office of the Gulf Intercoastal Conference at New Orleans, Louisiana, or San Francisco, California, and to become effective on the date signed by Secretary of the Gulf Intercoastal Conference for and on behalf of named carriers. (Notice of acceptance and execution of contracts by Gulf Intercoastal Conference will be sent to the shipper or consignee by the Secretary of the Gulf Intercoastal Conference.) Where contract jointly executed as indicated above has not been made, the tariff, or non-contract rates shall apply.

(b) Contract rates named in individual commodity items in this tariff referring to Rule 53 expire with midnight of December 31, 1935 subject to orders of United States Shipping Board Bureau, Department of Commerce.

(c) "Memorandum of Agreement made this — day of ——, between —— ——, hereinafter called the shipper, and

the several steamship lines undernamed, which constitute the Gulf Intercoastal Conference, hereinafter called the carriers, witnesseth:

1. The Shipper, in consideration of the agreement of the Carriers hereinafter set forth, agrees to ship by steamers of the Gulf Intercoastal Conference lines, operating from the ports of Beaumont, Texas, Houston, Texas, Lake Charles, Louisiana, Mobile, Alabama, New Orleans, Louisiana, and other Gulf ports, all of the water-borne shipments, which the Shipper shall make between the date hereof and —— — ——, inclusive, from the aforementioned ports, and any and all other United States Gulf ports, to the following United States Pacific Coast terminal ports:

Alameda, California, Los Angeles Harbor, California, Oakland, California, Portland, Oregon, San Francisco, California, Seattle, Washington, Tacoma, Washington,

and all other Pacific Coast ports, subject to paragraph 6 hereof, of the commodities hereinafter described, quanti- [fol. 32] ties being estimated at approximately — carloads of — net tons.

The shipments contemplated in this clause shall include not only any such shipments made directly by the Shipper and in its name, but also any such shipments, however and by whomsoever made, if for the benefit and on behalf of the Shipper.

2. The Shipper has the option of selecting, from such steamers of the Carriers as shall be operated from the port of shipment, the steamers upon which the shipments are to be made, subject, however, to mutual agreement between the Carrier so selected and the Shipper as to the quantity per steamer, the port or ports of loading and port or ports of discharge.

The booking contract for the carriage of the commodities covered by this agreement is to be individually with the Carrier specially agreeing to transport same, and not with the Carriers generally, and the shipment shall be subject to all the terms, conditions, and exceptions expressed in the freight contract, permits, dock receipts, mate's receipts, and regular form of bill of lading of the transporting Carrier in use at the time of shipment.

3. In consideration of said agreement of the Shipper, the Carriers agree to transport from the loading ports specifically named above and from such other loading ports in the United States Gulf at which their steamers may call (provided space is available when application is made therefor), to the Pacific Coast Terminal ports of discharge above named and all other United States and Canadian Pacific Coast ports for which cargo may be accepted, subject to paragraph 6 hereof, all of said shipments, and at the following rates by all Carriers named herein:

On commodities described in Items of the Gulf Intercoastal Conference Westbound Freight Tariff No. 1-B, SB-I No. 3, as amended or reissued, viz.:

4. If the Shipper shall make any shipments in violation hereof, this agreement shall immediately become null and void as to all future shipments, and thereupon the Shipper shall be liable to the transporting Carriers for payment of additional freight on all commodities theretofore shipped with such Carriers since the execution of this agreement, in the amount of the difference between the tariff contract rate or rates and the tariff non-contract rate or rates of the transporting carriers in force on such commodities at the time of such shipment.

5. In applying the rate or rates named herein the date of sailing of steamer transporting the cargo from the port at which the cargo is loaded shall govern.

6. This contract is subject to the rules and regulations of the Gulf Intercoastal Conference Westbound Freight Tariff No. 1-B, SB-I No. 3, as amended and re-issued and in effect on the date hereof, and is also subject to any rules, regulations and orders of the United States Shipping Board Bureau of the Department of Commerce now in effect or which may be put into effect during the term [fol. 33] of this contract.

For and on behalf of the Carriers:

Gulf Pacific Line, Gulf Pacific Mail Line, Ltd., Luckenbach Gulf Steamship Company, Inc., by Gulf Intercoastal Conference, by —— ——.

—— —— (shipper), by —— ——, (Address) ——.

STATE OF LOUISIANA,
Parish of Orleans:

Before me, the undersigned authority, personally came and appeared C. Y. Roberts, Agent, who, being duly sworn, deposes and says: That hereinabove is a true and correct copy of the form of contract or agreement to be jointly executed by shipper or consignee and the Gulf Intercoastal Conference for and on behalf of named carriers in order to permit application of contract rates as referred to herein.

(Signed) C. Y. Roberts, Agent.

Sworn to and subscribed before me this 31st day of August, 1935. (Signed) Louis A. Schwartz, Notary Public. (Seal.)

Upon application to the Gulf Intercoastal Conference, the following additional clause will be shown in contracts executed by a shipper having an affiliate which operates vessels and transports cargo to Pacific Coast ports to which rates named in this tariff apply.

Notwithstanding anything in this agreement to the contrary, it is understood and agreed by and between the parties hereto that Shipper may ship on vessels owned, chartered, managed and/or controlled by any affiliate of Shipper, whenever such vessels are available, it being understood that for the purposes of this agreement "affiliate" shall be deemed to mean any company a majority of the outstanding stock of which is owned, held or controlled by the corporation which owns, holds or controls a majority of shipper's outstanding stock.

The proposed schedules were suspended until February 3, 1936. The Gulf Intercoastal Conference, to which the contract rule refers, exists by virtue of agreement approved under section 15 of the Shipping Act, 1916. It is [fol. 34] composed of Luckenbach Gulf Steamship Company, Inc., Gulf Pacific Line, of which Swayne & Hoyt, Ltd., is the operating owner, and Gulf Pacific Mail Line, Ltd., of which Swayne & Hoyt, Ltd. is the managing agent. There are no other common carriers by water at present operating regularly through the Panama Canal in the transportation of general cargo from or to the Gulf.

The record in No. 126, Intercoastal Investigation, 1935, 1 U. S. S. B. B. 400, in so far as pertinent here, is stipulated into the record. That case involved a comprehensive investigation into intercoastal transportation. One of the orders entered therein required respondents here involved to discontinue the publication and maintenance of rates which accorded advantages in the westbound transportation of certain commodities to shippers who by written contracts obligated themselves to patronize respondents' lines exclusively in the westbound Gulf intercoastal transportation of such commodities. The contract rate system so condemned varied from the one now proposed only in form. The new rule and rates now under suspension were filed concurrently with other schedules which sought to comply with other orders issued in No. 126. To facilitate a determination as to the lawfulness of this new contract rate system, the department vacated its order condemning the contract rate system involved in No. 126, and at the same time respondents withdrew a petition filed in court attacking the validity of the earlier order. The present proceeding was then instituted.

Respondents first adopted a contract rate system in 1927. Such a system has been in force since that date except from July, 1928, to February, 1929, during which period the conference was disbanded. It has been and is the custom of respondents to make their contract rates expire on a date named, and to make contracts with shippers for limited periods. The contract period generally has been six months. Upon expiration of the contracts, contract [fol. 35] rates are again established and new contracts executed.

No particular rule has been followed by respondents in the selection of the commodities on which contract rates apply. However, such commodities are generally characterized by their heavy and steady movement. The record shows that between January 1, 1934, and June 30, 1935, approximately 63.7 per cent of the total tonnage moving westbound in intercoastal commerce at port-to-port rates via the lines of respondents moved on basis of contract rates, and that over 99 per cent of the traffic in commodities on which contract rates were provided moved under contract rates. No contract rate system is used in the eastbound trade. The amount of 10 cents per 100 pounds, by which the proposed contract rates are lower than the

non-contract rates, apparently was arbitrarily chosen by respondents. As explained by the principal witness of respondents:

> A shipper who does not want to execute a contract to my mind must have a very good reason for that. The only reason I can conceive of for a shipper not wanting to execute a contract would be the fact that he wants to hold to himself the right to chisel or avail himself of any tramp steamer that may come along, and take advantage of that lower rate. That being the case, he pays 10 cents per hundred for the privilege of holding himself out to patronize any cut-rate line that may come along.

The record shows that generally shippers who heretofore have executed rate contracts with respondents are satisfied with the contract rate system and urge its continuance. Only one of such shippers, and representatives of Sudden & Christenson (Arrow Line) and Nelson Steamship Company, common carriers by water engaged in inter coastal transportation between Atlantic and Pacific coasts, testified against the proposed rates and rule.

The reasons which gave rise to the adoption of a contract rate system are summarized by the principal witness for respondents as follows:

[fol. 36] Shortly after the first service was started from the Gulf through the Panama Canal, several years after the inauguration of the Gulf Intercoastal service, the trade was seriously disrupted by vicious rate-cutting practices, resultant rate wars, and so forth, which condition proved not only very unsatisfactory to the steamship lines themselves, but also to the shippers.

This condition not only very seriously depleted the revenues of the steamship lines, but brought about very unstable conditions with shippers, due to the fact that they could not figure what their freight rate would be, nor what their competitors' freight rate would be. As a result of this, considerable thought was given as to what steps could be taken to bring about a stabilized condition both as to service and as to rates. This action was taken both on the part of the steamship lines themselves and at the request of various shippers. The result is what is now known as the contract rate system.

It is upon such benefit to the shippers and to themselves that respondents rely in justification of the suspended rates and rule. It should be remembered, however, that at the time referred to by the witness carriers engaged in intercoastal transportation were only required to file their maximum rates. Nothing in the law then in force prevented them from collecting compensation for their services lower than such maximum rates. The law at present in effect not only requires such carriers to file the rates which they charge for transportation, from which they are prohibited to depart, but also prescribes an orderly manner for changing the rates. This includes thirty days' notice to the public, and this department is given the power to suspend, upon complaint or upon its own initiative without complaint, any proposed change pending a hearing concerning its lawfulness.

Sudden & Christenson (Arrow Line) and Nelson Steamship Company object to the proposed rates and rule on the ground, as stated by a witness for one of these carriers, that "the contract system serves to create a monopoly in favor of the Gulf contract carriers." As stated in Intercoastal Investigation, 1935, supra:

* * * Furthermore carriers are not justified in attempting to restrict traffic to move over their lines. * * * The prohibition of discrimination means, among other things, that no difference or distinction shall be made in rates that coerce the public to employ one competitor to the exclusion of another, or deprive one competitor of business which under freedom of selection by the public would be given to it, and thus create a monopoly in favor of another competitor,

[fol. 37] citing Menacho v. Ward, 27 Fed. 529, which was cited with approval in Eden Mining Co. v. Bluefields Fruit & S. S. Co., 1 U. S. S. B. 41. Respondents there as here relied on Rawleigh v. Stoomvaart et al., 1 U. S. S. B. 285. That case involved transportation in foreign commerce, and the decision therein has no controlling effect on a proceeding involving intercoastal transportation. As stated in the report in the Intercoastal Investigation, 1935, supra:

It is notorious that intercoastal transportation is not attended by many of the traffic and transportation cir-

cumstances attending transportation in foreign commerce * * *.

In the Rawleigh case the evidence showed that the purpose and ultimate effect of the contract rate system as employed in that trade was to enable the carriers to approximate the volume of cargo that would move over their lines and to insure stability of rates and regularity of service. Operators of vessels in our foreign commerce may at any time and without warning be subjected to severe competition by tramp vessels of any nation. Unlike the intercoastal trade, there exists no statutory requirement that changes in rates be published thirty days in advance, nor is the department given any power to suspend such changes. In so far as ocean tramps in foreign commerce are concerned, they are subject to no regulatory authority whatsoever.

In the present case shippers are in effect given the choice of only two carriers, whereas in the Rawleigh case the contract rate system was neither in purpose nor effect monopolistic. Contract shippers, by the terms of their contracts, were afforded the services of at least eleven different carriers, including not only the members of the conference involved but also a non-conference line, the only other carrier in the trade. Furthermore, the record in that proceeding, unlike the record now before the department, indicates the willingness of the conference lines to admit other carriers into conference membership.

[fol. 38] It should be understood that the department is not here sanctioning all contract rate systems in foreign commerce. Whether any such system is lawful is a question which must be determined by the facts in each case.

By law intercoastal carriers are forbidden to make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable preference or disadvantage in any respect whatsoever. This department is given the power, either upon complaint or upon its own initiative without complaint, to enter upon a hearing concerning the lawfulness of any schedule stating a new individual or joint rate, or

charge, or any new individual or joint classification, regulation, or practice affecting any rate or charge, and to suspend the operation of any such schedule for a period no longer than four months. Such provisions of law afford to shippers reasonable rate stability, and it is clear that the real purpose of the suspended rates and rule is to prevent shippers from using the lines of other carriers, and to discourage all others from attempting to engage in intercoastal transportation from and to the Gulf.

The department finds the contract rates system provided for in the schedules under suspension not justified by transportation conditions in the trade involved, and unduly and unreasonably preferential and prejudicial in violation of section 16 of the Shipping Act, 1916. An order will be entered requiring the cancellation of such schedules.

[fol. 39] Department of Commerce,

Office of the Secretary, Washington

No. 294

Gulf Intercoastal Contract Rates

Order

It appearing, That by Suspension Order No. 50, dated September 16, 1935, the Department entered upon a hearing concerning the lawfulness of the rates, charges, regulations, and practices stated in the schedules described in said order, and suspended the operation of said schedules until February 3, 1936; and

It further appearing, That a full investigation of the matters and things involved has been had, and that the Department, on the date hereof, has made and entered of record a report stating its conclusions and decisions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, That the respondents herein be, and they are hereby, notified and required to cancel said schedules on or before February 3, 1936, upon not less than one day's posting and filing in the manner required by law, and that this proceeding be discontinued; and

It is further ordered, That the cancellations herein ordered may be made in a consecutively numbered supple-

ment to Agent C. Y. Roberts' Tariff SB-I No. 3, without observing the requirements of the Department's tariff rules.

(Signed) Daniel C. Roper, Secretary of Commerce.

January 21, 1936.

[fol. 40] In Supreme Court of the District of Columbia, Sitting as a United States District Court for the District of Columbia

In Equity. No. 60,850

Swayne & Hoyt, Ltd. (Gulf Pacific Line), a Corporation, 620 Matson Building, San Francisco, California; Gulf Pacific Mail Line, Ltd., a Corporation, 620 Matson Building, San Francisco, California; Luckenbach Gulf Steamship Company, Inc., a Corporation, 120 Wall Street, New York City, Plaintiffs,

v.

United States of America, Defendant

Elisha Hanson, Eliot C. Lovett, and Frank Lyon, all of Washington, D. C., for plaintiffs.

Leslie C. Garnett, United States Attorney, H. L. Underwood, Assistant United States Attorney, and R. H. Hallett, Assistant Counsel, U. S. Shipping Board Bureau, all of Washington, D. C., for defendant.

Before Groner, Judge, United States Court of Appeals, and Wheat, C. J., and Proctor, J., Supreme Court of the District of Columbia

Opinion—Filed June 29, 1936

Per Curiam:

This is an equity suit brought by plaintiffs to set aside an order of the Secretary of Commerce requiring plaintiffs (who compose the Gulf Intercoastal Conference) to cease and desist the practice of entering with shippers into certain rate contracts.

[fol. 41] The order complained or restrained plaintiffs from charging two separate rates for the same service:

one, the higher, charged against those shippers who refused to sign contracts agreeing to use plaintiffs' facilities exclusively; the other, a lower, charged against those shippers who enter into such contracts. The hearing was by a court constituted in accordance with the provisions of Sec. 47 of Title 28, U. S. C. A. (see also Act Sept. 7, 1916, ch. 451, sec. 31, 39 Stat. 738).

Up to 1916 there was—speaking generally—no regulation by Congress of the rate structure and other practices of common carriers engaged in intercoastal transportation. In 1916 Congress passed the Shipping Act (39 Stat. 733, 46 U. S. C., 812). The Act applies somewhat differently to carriers by water engaged in foreign commerce and those engaged in intercoastal commerce. As to the latter Congress required that schedules of reasonable rates, fares, etc., should be filed with the Shipping Board and observed by the carriers. The Act forbade carriers' charging anything in excess of the maximum except with the approval of the Board; forbade rebates, discrimination, or unfair methods against a shipper patronizing another carrier. Section 16 provides that.

It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. to make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. * * *

[fol. 42] In 1933 Congress enlarged the powers of the Shipping Board (47 Stat. 1425, 46 U. S. C. 844). The new Act required every carrier to file with the Shipping Board and keep open to the public its actual schedule of rates, fares, etc.; and forbade any change in the rates, fares, etc., except by publishing and filing a new schedule not effective, without the approval of the Board, earlier than thirty days after filing; and gave the Board power to suspend the effectiveness of the new schedule pending a hearing. Under the 1916 Act carriers were required to file only their maximum rate. Under the 1933 Act they are required to file

their actual rate, and the actual rate so filed may not be changed without giving thirty days' notice.

On June 10, 1933, the President issued an executive order numbered 6166, pursuant to the Executive Department Reorganization Act of June 30, 1932, as amended March 3, 1933 (47 Stat. 1517), whereby he abolished as of August 10, 1933, the United States Shipping Board and transferred its functions to the Department of Commerce. Ever since, the functions of the Shipping Board have been administered by the Department of Commerce under the direction of the Secretary.

In February, 1934, the Secretary instituted an investigation into the practices of intercoastal carriers, including the practice of extending preferential rates to shippers who agreed to use the carrier's facilities exclusively. This original proceeding was designated Docket No. 126. As a result of the hearings, an order was entered July 3, 1935, requiring the Gulf Conference on or before October 3, 1935, to discontinue the use of the contract rate system as embodied in the tariff on file. This order was vacated September 16, 1935, and a new hearing held, known as Docket No. 294. On January 21, 1936, the Department issued its report of the investigation, and the Secretary issued his order requiring the Gulf Conference to cancel the contract rates as contained in its tariff. The findings of the Secretary were:

[fol. 43] 1. "It is clear that the real purpose of the suspended rates and rule is to prevent shippers from using the lines of other carriers and to discourage all others from attempting to engage in intercoastal transportation from and to the Gulf."

2. "The department finds the contract rate system provided for in the schedules under suspension not justified by transportation conditions in the trade involved and unduly and unreasonably preferential and prejudicial in violation of section 16 of the Shipping Act, 1916."

The effective date of the order was continued to June 30, 1936, and it is the purpose of this suit to annul and set it aside, on the grounds that the findings of the Department and the order of the Secretary are contrary to the evidence and contrary to the law applicable to the situation.

The question of the lawfulness of the order, and the further question whether the transfer of the functions and authority of the Shipping Board to the Shipping Board Bureau of the Department of Commerce is legal and valid, are the two questions for decision.

Briefly, the contract rate system works as follows: The Conference selects a number of items as to which it establishes a contract rate. These items are usually those heavy commodities which move regularly in large quantities. Shippers of these commodities may execute a contract and thus avail themselves of the advantages of a lower rate that during the period of the contract may not be increased. The shipper—as his part of the agreement—promises to ship by vessels of the Conference lines all water-borne shipments which he makes from any Gulf port to the west coast during the term of the contract. The agreement does not prevent the shipper from transporting by rail to the west coast or from shipping out of north Atlantic or south Atlantic ports. It does require him, however, if he ships from the Gulf to the west coast to use one of the Conference lines, and paragraph 4 of the contract provides that if the shipper violates this agreement, the whole contract shall terminate and the shipper shall be liable for the non-contract rate on all shipments made during the term of the contract. The contracts are executed for a term of six months.

[fol. 44] The non-contract rate is the rate fixed for items covered by the contract rate when those items are shipped by a person who has not executed a contract with the conference. It is 10 cents per hundred pounds or $2.00 per ton higher than the contract rate, and this figure is arbitrarily fixed. There is no difference in the service offered or rendered to a contract and a non-contract shipper. As explained by the Chairman of the Conference, a non-contract shipper pays 10 cents per hundred pounds for the privilege of holding off to patronize any cut-rate line that may come along. The witnesses for the Conference testified that approximately 64% of all port-to-port tonnage carried by plaintiffs (west bound) moved under contract rates, and that of this 64%, more than 99% moved under contracts. The contract rate applies only to west bound port-to-port shipments and does not apply to combination rail or barge shipments.

In justification of the contract system, the plaintiffs point out the disastrous results of rate wars in the past, the stability of rates and service as the result of the system, the insufficiency of traffic from the Gulf to support another line, and the almost universal satisfaction and approval with which all shippers regard the system.

The Department, on the other hand, insists the effect of the system is to create a monopoly in favor of the Conference lines to the exclusion of any other lines which might wish to enter the Gulf intercoastal trade; is also to force shippers to tie themselves up for a period of six months and lose the opportunity of using other lines which might offer cheaper service; and, finally, to require those who do not tie themselves up to pay an unjust and discriminatory rate.

There is much to be said, from a practical standpoint, in favor of the Conference system, for there is no dispute that the Gulf trade has suffered by rate-cutting wars and equally, as we think, no dispute that the system tends to stabilize conditions. The evidence likewise supports the position that the available traffic from Gulf ports will not support [fol. 45] another line and that the invasion of the territory by an outsider would necessarily result in rate wars and some demoralization of shipping. In all these respects it commends itself to those immediately concerned. It is not, therefore, surprising that the great bulk of the patrons of the Conference lines express approval of the system. The stability of rates and of service enables them to quote prices for future deliveries, with the assurance that for several months, at least, there will be no increase in freight charges. While saying this much, however, these shippers realize, as of course is obvious, that the purpose and effect of the contract system is to force traffic to the Gulf Conference lines and to that extent to create a monopoly so far as shipment from Gulf ports is concerned.

Notwithstanding this latter condition, the great majority of shippers, as we have seen, assert the desirability of the system because of reliability of service and reasonableness of rate. To obtain these they are willing to for-go the opportunities of cheaper rates from an occasional intruder or cheaper rates with demoralization of service incident to a rate war. Plaintiffs assert that there is nothing in the

system to prevent other lines, if they desire, from applying for membership in the Conference and enjoying the benefits of the system. But, in spite of this, the fact is that if a shipper wants to hold himself free to get a lower rate from casual non-established carriers, he must pay $2.00 a ton more than the shipper who agrees to use the Conference lines exclusively; and freedom of operation in the Gulf is more theoretical than practical, for if the business offered is only enough to load one vessel each week, as seems to be conceded, it would be business folly for others regularly to enter the field.

Without deciding, therefore, to what extent we are bound by the finding of the Secretary that the practice is discriminatory and violates the provision of Section 16 of the Act, we are of opinion that the admitted and undisputed facts bring the practice within the condemnation of the statute. The Act makes it unlawful for the carrier to give any undue [fol. 46] or unreasonable preference or advantage to any particular person or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. The contract in question unquestionably confers a preference on the shippers who accept it. Through it they obtain a rate of $2.00 per ton less than the rate charged other shippers for the same commodities for the same service in the same ships. There can be no dispute on that subject. But, admitting this, plaintiffs say that the preference must be undue or unreasonable and point to the language of the statute in support of their position. They insist that the preference to their contract shippers is not unreasonable, is offered to all alike, and is reciprocally beneficial—beneficial to the carrier because it insures it a constant flow of remunerative business and beneficial to the shipper because it insures him stability of rate and regularity of service. And all of this may be true. But the unreasonableness of the contract is in the fact that it insures to one shipper who is willing to tie himself up by contract the same service at a cheaper rate than the carrier is willing to extend to another shipper who is not, and thus is effective to coerce all shippers to abandon the advantages of competition or pay a penalty. It is likewise subject to condemnation for this reason.—The rate charged the contract shippers obviously

is, from the carrier's point of view, a remunerative rate. This being true, the exaction of a higher rate by 10¢ per cwt. from all other shippers is an undue and unreasonable exaction. It is in effect a penalty.

Not only is this true, but the contract is likewise prejudicial to the "locality", i. e., the Gulf territory, because the tendency is to exclude all competition and create a monopoly in favor of the Conference carriers. The effect of the monopoly is to destroy the checks and balances imposed by free and unrestrained competition; and we can not doubt that, in forbidding any water carrier from subjecting any locality to unreasonable prejudice or disadvantage, Congress intended to include any act the tendency of which would be to destroy the restraints which competition imposes.

[fol. 47] Here the result of the contract system is a complete, effective, and perpetual bar restraining all other carriers from attempting to serve the public as carriers between Gulf ports and the west coast. Such an imposed monopoly was unreasonable discrimination at common law.—Menacho v. Ward, 27 Fed. 529. It is no less so, under the provisions of the federal statute. In saying this we are by no means unmindful of the problems of the American shipowner. That these problems are pressing to the point of emergency, is obvious to those who have watched the steady decline of American shipping since the period of the World War; and that the problem requires special treatment from Congress is, we believe, universally admitted. The increase and maintenance of the American merchant marine is a subject of national concern, indeed of national safety, but the remedy is political and not judicial.

Second. The transfer of the former functions of the United States Shipping Board by executive order to the Department of Commerce was, in our opinion, in all respects legal and effective to confer on the Secretary all the regulatory powers of the statute. The question is not new. Precisely the same point was urged in Isbrandtsen-Moller Company, Inc., v. United States, et al., 14 F. Supp. 407; and the opinion of Judge Chase so fully and, as we think, satisfactorily answers it that nothing more need be said, except to refer to that case and adopt its reasoning, which we do.

In view of what is said above, it follows that the bill in this case should be, and it is dismissed.

Dismissed.

[fol. 48] In United States District Court for the District of Columbia

[Title omitted]

Findings of Fact and Conclusions of Law—Filed October 26, 1936

This is an equity suit to set aside an order of the Secretary of Commerce requiring plaintiffs to cease and desist from the practice of entering with shippers into certain rate contracts. The Court, being advised in the premises, now makes the following—

Findings of Fact

1. Plaintiffs herein are common carriers by water subject to the Shipping Act of 1916 and amendments, the Merchant Marine Act of 1920, and amendments, and the Intercoastal Act of 1933, and engage in the transportation of freight from ports in the Gulf of Mexico area to ports on the Pacific Coast of the United States via the Panama Canal.

2. Plaintiffs are members of the Gulf Intercoastal Conference as a result of a conference agreement dated January 22, 1934, filed with the United States Shipping Board Bureau, Department of Commerce, January 24, 1934, and approved March 28, 1934. The Gulf Pacific Mail Line, Ltd., plaintiff, is a member of the conference primarily engaged in foreign commerce, but also carries some freight in the intercoastal trade eastbound from the Pacific Coast to the Gulf ports; where, for the most part, its vessels are operated in the westbound traffic by the Gulf Pacific line. The [fol. 49] Gulf Pacific Mail Line, Ltd., has no vote in the conference.

3. The Gulf Intercoastal Conference on May 25, 1933, filed with the Department of Commerce a tariff of rates to be effective June 2, 1933. The tariff of rates so filed contained a provision designated Rule 53 which related to contracts which were available to all shippers of items con-

tained in the tariff to which Rule 53 was applicable. By the terms of the contract, the shipper who executed it agreed, for a period of usually six months, to ship by the Conference lines all of the commodities described in the contract which he might ship by water from Gulf ports to the Pacific Coast. The shipper who signed a contract received a freight rate which was 10¢ per hundred pounds, or $2 per ton, less than the regular rate charged for the same item to those shippers who would not sign a contract.

4. On February 10, 1934, the Secretary of Commerce on his own initiative instituted an investigation into various practices of all intercoastal carriers including the Gulf Intercoastal Conference practice covered by the contract rate filed by the Conference. This was known as Docket No. 126. As a result of the hearings held in connection with the investigation, the Secretary of Commerce, on July 3, 1935, ordered plaintiffs to cease and desist from the practice on October 3, 1935, just prior to which date all then existing contracts between the Gulf Conference lines and shippers were to expire by their terms. Plaintiffs filed on September 2, 1935, a new schedule of rates to be effective October 3, 1935, and this schedule contained Rule 53. The prior order of the Secretary of Commerce was vacated September 16, 1935, and a new hearing and investigation confined to the practice of the contract rate was held, known as Docket No. 294. On January 21, 1936, the Department issued its report of the investigation. The final findings were as follows:

[fol. 50] 1. "It is clear that the real purpose of the suspended rates and rule is to prevent shippers from using the lines of other carriers and to discourage all others from attempting to engage in intercoastal transportation from and to the Gulf."

2. "The department finds the contract rate system provided for in the schedules under suspension not justified by transportation conditions in the trade involved and unduly and unreasonably preferential and prejudicial in violation of section 16 of the Shipping Act, 1916."

Thereupon, the Secretary ordered—

"That the respondents herein be, and they are hereby, notified and required to cancel certain schedules on or be-

fore February 3, 1936, upon not less than one day's posting and filing in the manner required by law, and that this proceeding be discontinued;".

5. The items in the tariff covered by Rule 53 and entitled to the contract rate were selected by the Conference lines and covered usually those commodities which moved regularly and in large volume. The differential between the contract and the non-contract rate of 10¢ per hundred pounds or $2 per ton was arbitrarily fixed and does not represent any difference in cost to the lines in transporting the freight or any difference in character of service rendered by the carriers to the shipper. The non-contract shipper pays 10¢ per hundred pounds for the privilege of being able to patronize any cut-rate line that may come along. Any and all shippers are entitled to execute a contract. The execution of a contract does not preclude a shipper from shipping his contract commodities by rail or by water from Atlantic ports. The contract rates apply only to port-to-port westbound tonnage, and do not apply to rail and combination rail and barge shipments, or to eastbound shipments. The contract contains a provision that if the shipper violates the agreement the whole contract shall terminate and he shall be liable for the non-contract rate on all shipments he may have made during the term of the contract.

6. Approximately 64 per cent of all port-to-port tonnage carried by conference lines westbound was contractable. [fol. 51] More than 99 per cent of this 64 per cent moved under contract rates, and less than one per cent moved at the higher non-contract rates.

7. Disastrous rate wars have occurred in the Gulf Pacific Intercoastal service in the past. The adoption of the contract rate system has tended to stabilize conditions. The available traffic from Gulf ports will not support another line, and the invasion of the territory by another line would necessarily result in rate wars and some demoralization of shipping. The great bulk of the patrons of the conference lines expressed their approval of the system, although a small minority, two steamship lines, and a port in the Gulf district, protested against its continuance. One of the shippers who protested against its continuance was engaged in the same business as two of those who were in favor of it.

The stability of rates and service enabled the patrons of the conference lines to quote prices for future deliveries with the assurance that for several months at least there would be no increase in freight charges.

8. The terms of the Conference Agreement covering the admission of new members contains the following:

"6. Any person, firm or corporation engaged in said Intercoastal trade may hereafter become a party to this agreement by the consent of a majority of the parties hereto by affixing his, their or its signature hereto. Such admission for membership in this Conference, on official application, shall not be denied to any party except for just and reasonable cause; further, no such admission to membership is to be effected until modification recording same has been filed with and approved by the United States Department of Commerce. In the event of a change in the number of members of the Conference there shall be a meeting within two weeks thereafter for the purpose of amending all terms and rules of the agreement covering voting."

There has been only one application for membership to the Conference by another line, which application was refused because the applicant did not show that it was a regularly established line in the service.

[fol. 52] 9. On June 10, 1933, the President of the United States issued Executive Order No. 6166, whereby he abolished, as of August 10, 1933, the United States Shipping Board and transferred its functions to the Department of Commerce. The functions of the United States Shipping Board have been administered by the Department of Commerce under the direction of the Secretary since that date.

10. There was substantial evidence to support the findings and order of the Secretary of Commerce.

Conclusions of Law

1. The practice of the plaintiffs of entering into contracts with shippers giving plaintiffs exclusive patronage in return for which plaintiffs give those shippers a lower rate for the same service than that charged to shippers who refuse to grant exclusive patronage is in violation of the

provisions of Section 16 of the Shipping Act, 1916, 39 Stat. 734, because—

(A) It gives the shipper securing the lower rate an undue preference and advantage and works an undue prejudice and disadvantage on the shipper paying the higher rate by making him pay a penalty.

(B) It works an undue prejudice and disadvantage against the locality of the Gulf District by creating a monopoly and preventing the Gulf District from enjoying the benefits of competing services.

2. The transfer of the former functions of the United States Shipping Board by the President of the United States was legal and effective to confer on the Secretary of Commerce all of the regulatory powers of the statute, and [fol. 53] the Secretary of Commerce was acting within the scope of the authority thus legally conferred upon him in issuing the order in question.

D. Lawrence Groner, Justice, United States Court of Appeals for the District of Columbia. Alfred A. Wheat, Chief Justice, District Court of the United States for the District of Columbia. James M. Proctor, Justice, District Court of the United States for the District of Columbia.

MEMO.—The foregoing Findings of Fact and Conclusions of Law are this day filed by consent and agreement of all parties to comply with Equity Rule 70½.

D. L. G.

October 23, 1936.

[fol. 54] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

In Equity. No. 60850

SWAYNE & HOYT, LTD. (Gulf Pacific Line), a Corporation, 620 Matson Building, San Francisco, California; Gulf Pacific Mail Line, Ltd., a Corporation, 620 Matson Building, San Francisco, California; Luckenback Gulf Steamship Company, Inc., a Corporation, 120 Wall Street, New York City, Plaintiffs,

v.

UNITED STATES OF AMERICA, Defendant

FINAL DECREE—Filed July 15, 1936

This cause came on to be heard before a Statutory Court convened pursuant to the provisions of Sec. 47 of Title 28, U. S. C. A., also Sec. 830 of Title 46, U. S. C. A., and was argued by counsel; and the Court having reached its conclusion for the reasons set forth in its opinion filed herein June 29, 1936, that the bill of complaint should be dismissed, it is now this 15th day of July, 1936,

Ordered, Adjudged and Decreed that the bill of complaint be, and the same hereby is, dismissed; and that the defendant have and recover its costs to be taxed by the Clerk.

D. Lawrence Groner, Justice, United States Court of Appeals for the District of Columbia. Alfred A. Wheat, Chief Justice, District Court of the United States for the District of Columbia. James M. Proctor, Justice, District Court of the United States for the District of Columbia.

Rec. 7/28/36.

Approved as to form:

Elisha Hanson, Eliot C. Lovett, Attorneys for Plaintiffs.

[fol. 55] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

Petition for Appeal, Assignment of Errors and Prayer for Reversal—Filed August 14, 1936

This is a proceeding to review an order of the Secretary of Commerce seeking to abolish a certain contract rate system which for many years had been employed by the appellants in their shipping business. There is also drawn into question the authority of the Secretary to issue any such order because of the unconstitutional delegation of power which resulted in the Executive Order purporting to abolish the United States Shipping Board Bureau and transfer its functions to the Department of Commerce. A hearing was held before a special statutory court of three judges constituted for that purpose on April 6th and 7th, 1936, which resulted in an order denying relief and dismissing the Bill of Complaint.

PETITION FOR APPEAL

The appellants, Swayne & Hoyt, Ltd., Gulf Pacific Mail Line, Ltd., and Luckenbach Gulf Steamship Company, considering themselves aggrieved by the final decision of the District Court of the United States for the District of [fol. 56] Columbia in the above entitled cause, hereby pray that an appeal be allowed from the said court herein, and for an order fixing the amount of the bond thereon.

ASSIGNMENT OF ERRORS

Appellants, Swayne & Hoyt, Ltd., Gulf Pacific Mail Line, Ltd., and Luckenbach Gulf Steamship Company, assign the following errors in the record and proceedings in said case:

The District Court of the United States for the District of Columbia erred—

1. In refusing the injunction prayed for and in dismissing the Bill of Complaint.

2. In finding that the order appealed from is supported by substantial evidence and is lawful and valid.

3. In refusing to vacate and annull the order of the Department of Commerce.

4. In finding that the contract rate system results in any undue or unreasonable preference or advantage.

5. In finding that the contract rate system results in any undue or unreasonable prejudice or disadvantage.

6. In finding that the charging of a higher rate under the contract rate system is, in effect, a penalty.

7. In finding that the contract rate system creates a monopoly in favor of the Conference carriers.

8. In finding that the contract rate system results in unreasonable discrimination.

9. In finding that the transfer of the former functions of the United States Shipping Board by Executive Order to the Department of Commerce was legal and effective to confer on the Secretary of Commerce all the regulatory powers of the Shipping Act, as amended.

[fols. 57-63] 10. In failing to find that the transfer of the former functions of the United States Shipping Board to the Department of Commerce was pursuant to an unconstitutional act of Congress.

11. In failing to find that the findings and order of the Department of Commerce were not supported by substantial evidence.

12. In failing to find that the contract rate system is justified by the record.

13. In failing to find that the contract rate system has tended to further the purposes of the Shipping Act, 1916.

14. In other respects shown by the record.

PRAYER FOR REVERSAL

For which errors the appellants, Swayne and Hoyt, Ltd., Gulf Pacific Mail Line, Ltd., and Luckenbach Gulf Steamship Company, Inc., pray that the said judgment of the District Court of the United States for the District of Columbia dated July 15, 1936, in the above-entitled cause, be reversed and a judgment rendered in favor of the appellants, and for costs.

Respectfully submitted, Elisha Hanson, Eliot C. Lovett, Frank Lyon, Counsel for Appellants.

[fols. 64-66] In Supreme Court of the United States

[Title omitted]

Order Allowing Appeal and Fixing Bond—Filed August 14, 1936

Upon consideration of the application of the appellants in the above entitled proceeding, and good cause therefor having been shown, it is this 11th day of August, 1936,

Ordered that an appeal to the Supreme Court of the United States be and the same is hereby allowed from the decree of the District Court of the United States for the District of Columbia dated July 15, 1936 wherein Swayne and Hoyt, Ltd., Gulf Pacific Mail Line, Ltd., and Luckenbach Gulf Steamship Company, Inc., are appellants, and The United States of America is appellee, and it is

Further Ordered, that the appellants furnish a bond, with good and sufficient security, in the sum of Five hundred Dollars to secure the costs upon appeal, such bond to be approved by the clerk of the court wherein the judgment was rendered.

Willis Van Devanter, Associate Justice of the Supreme Court of the United States.

[fol. 67] Citation, in usual form, showing service on Stanley Reed, filed August 17, 1936, omitted in printing.

[fol. 68] Bond on appeal for $500.00, approved and filed August 14, 1936, omitted in printing.

[fol. 69] In Supreme Court of the District of Columbia

[Title omitted]

Stipulation as to Record—Filed September 28, 1936

It is hereby stipulated by and between the parties hereto that there shall be incorporated in the transcript on appeal to the Supreme Court of the United States the following portions of the record:

1. Bill of Complaint for an Injunction.
2. Answer of the United States of America, including Exhibits "A" and "B" attached thereto.
3. Opinion of Statutory Court; also Findings of Fact and Conclusions of Law.
4. Final decree of Statutory Court.
5. Petition for appeal, assignment of errors, and prayer for reversal.
6. Statement as to jurisdiction on appeal.
7. Order allowing appeal and fixing bond.
8. Notice of Service of documents upon the Solicitor General.
9. Citation and notice of service thereof.
10. Copy of bond upon appeal.
11. Statement of Evidence.

[fol. 70] 12. This stipulation.

Swayne & Hoyt, Ltd. (Gulf Pacific Line), Gulf Pacific Mail Line, Ltd., Luckenbach Gulf Steamship Company, Inc., by Elisha Hanson, Eliot C. Lovett, Frank Lyon. United States of America, by Stanley Reed, Solicitor General of the United States.

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ORDER SETTLING STATEMENT OF EVIDENCE—October 19, 1936

The Court resumes its sessions pursuant to adjournments, The Justices sitting in Equity, presiding.

* * * * * * *

Come now the parties hereto by their respective attorneys of record, and, thereupon, the plaintiffs by their attorneys, present to the Court their Statement of Evidence taken at the trial of this cause, and pray that the same be signed and made of record, nunc pro tunc, which is hereby, accordingly done.

D. Lawrence Groner, Justice, United States Court of Appeals for the District of Columbia. Alfred A. Wheat, Chief Justice, District Court of the United States for the District of Columbia. James M. Proctor, Justice, District Court of the United States for the District of Columbia.

[fol. 71] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 72] In United States District Court for the District of Columbia

Equity. No. 60850

Swayne & Hoyt et al., Plaintiffs,

v.

United States of America, Defendants

Statement of Evidence

At the hearing of the above entitled cause on April 6 and 7, 1936, before Mr. Justice Groner, of the United States Court of Appeals for the District of Columbia, and Mr. Chief Justice Wheat and Mr. Justice Proctor, of the District Court of the United States for the District of Columbia, sitting as a special statutory court, the following proceedings were had and evidence offered and received:

Offers in Evidence

There was introduced in evidence a copy of the complete record of the hearings held by the United States Shipping Board Bureau, Department of Commerce, in Docket 294, "Gulf Intercoastal Contract Rates." This record contained all of the transcript of testimony taken at said hearing and included the Exhibits offered and marked at said hearing. The record as introduced in this court was marked "Exhibits 1 to 5, inclusive."

The hearings were held in New York City on October 22, 1935, before an Examiner of the United States Shipping Board Bureau, Department of Commerce, and the evidence there introduced was submitted to the Secretary of Commerce, who issued his findings of fact and conclusions of law and also an order in connection therewith, all as set forth in the Exhibits attached to the answer of the defendant herein.

[fol. 73] The tariff rule involved and the items of the tariff referring thereto were a part of the record before the Examiner. The rule involved is as follows:

Rule 53. Procedure in Connection with Execution of Contracts at Contract Rates.

(a) Where specific reference is made to this rule in individual commodity items in this tariff, the rates named in such items are contract rates and in the absence of contracts as provided for in this rule, the rates on such commodities will be ten cents per one hundred pounds or two dollars per ton of two thousand pounds higher than the rates named in such items.

Contract rates as provided herein may be secured by any shipper or consignee subject to joint execution by shipper or consignee on the one hand and the Gulf Intercoastal Conference for and on behalf of named carriers on the other of term contract, in the form indicated in Section (c) hereof, applying from specific ports of loading to specific ports of discharge, such contract signed by the shipper or consignee to be transmitted by him to the office of the Gulf Intercoastal Conference at New Orleans, Louisiana, or San Francisco, California, and to become effective on the date signed by Secretary of the Gulf Intercoastal Conference for and on behalf of named carriers. (Notice of acceptance and execution of contracts by Gulf Intercoastal Conference will be sent to the shipper or consignee by the Secretary of the Gulf Intercoastal Conference.) Where contract jointly executed as indicated above has not been made, the tariff, or non-contract rates shall apply.

(b) Contract rates named in individual commodity items in this tariff referring to Rule 53 expire with midnight of December 31, 1935 subject to orders of United States Shipping Board Bureau, Department of Commerce.

(c) "Memorandum of Agreement made this — day of ——, between —— ——, hereinafter called the shipper, and the several steamship lines undernamed, which constitute the Gulf Intercoastal Conference, hereinafter called the carriers, witnesseth:

1. The Shipper, in consideration of the agreement of the Carriers hereinafter set forth, agrees to ship by steamers of the Gulf Intercoastal Conference lines, operating from the ports of Beaumont, Texas, Houston, Texas, Lake Charles, Louisiana, Mobile, Alabama, New Orleans, Louisiana, and other Gulf ports, all of the water-borne ship-

[fol. 71] ments, which the Shipper shall make between the date hereof and , inclusive, from the aforementioned ports, and any and all other United States Gulf ports, to the following United States Pacific Coast terminal ports:

Alameda, California, Los Angeles Harbor, California, Oakland, California, Portland, Oregon, San Francisco, California, Seattle, Washington, Tacoma, Washington,

and all other Pacific Coast ports, subject to paragraph 6 hereof, of the commodities hereinafter described, quantities being estimated at approximately carloads of net tons.

The shipments contemplated in this clause shall include not only any such shipments made directly by the Shipper and in its name, but also any such shipments, however and by whomsoever made, if for the benefit and on behalf of the Shipper.

2. The Shipper has the option of selecting, from such steamers of the Carriers as shall be operated from the port of shipment, the steamers upon which the shipments are to be made, subject, however, to mutual agreement between the Carrier so selected and the Shipper as to the quantity per steamer, the port or ports of loading and port or ports of discharge.

The booking contract for the carriage of the commodities covered by this agreement is to be individually with the Carrier specially agreeing to transport same, and not with the Carriers generally, and the shipment shall be subject to all the terms, conditions, and exceptions expressed in the freight contract, permits, dock receipts, mate's receipts, and regular form of bill of lading of the transporting Carrier in use at the time of shipment.

3. In consideration of said agreement of the Shipper, the Carriers agree to transport from the loading ports specifically named above and from such other loading ports in the United States Gulf at which their steamers may call (provided space is available when application is made therefor), to the Pacific Coast Terminal ports of discharge above named and all other United States and Canadian Pacific Coast ports for which cargo may be accepted, subject to paragraph 6 hereof, all of said shipments, and at the following rates by all Carriers named herein:

On Commodities described in Items of the Gulf Intercoastal Conference, Westbound Freight Tariff No. 1-B, SB-I No. 3, as amended or reissued, viz:

[fol. 75] 4. If the Shipper shall make any shipments in violation hereof, this agreement shall immediately become null and void as to all future shipments, and thereupon the Shipper shall be liable to the transporting Carriers for payment of additional freight on all commodities theretofore shipped with such Carriers since the execution of this agreement, in the amount of the difference between the tariff contract rate or rates and the tariff non-contract rate or rates of the transporting carriers in force on such commodities at the time of such shipment.

5. In applying the rate or rates named herein the date of sailing of steamer transporting the cargo from the port at which the cargo is loaded shall govern.

6. This contract is subject to the rules and regulations of the Gulf Intercoastal Conference Westbound Freight Tariff No. 1-B, SB-I No. 3, as amended and re-issued and in effect on the date hereof, and is also subject to any rules, regulations and orders of the United States Shipping Board Bureau of the Department of Commerce now in effect or which may be put into effect during the term of this contract.

For and on behalf of the Carriers:

Gulf Pacific Line, Gulf Pacific Mail Line, Ltd., Luckenbach Gulf Steamship Company, Inc., by Gulf Intercoastal Conference, by ——— ———.

——— ——— (shipper), by ———, ——— (Address) ———.

STATE OF LOUISIANA,
Parish of Orleans:

Before me, the undersigned authority, personally came and appeared C. Y. Roberts, Agent, who, being duly sworn, deposes and says: That hereinabove is a true and correct copy of the form of contract or agreement to be jointly executed by shipper or consignee and the Gulf Intercoastal Conference for and on behalf of named carriers in order to permit application of contract rates as referred to herein.

(Signed) C. Y. Roberts, Agent.

Sworn to and subscribed before me this 31st day of August, 1935. (Signed) Louis A. Schwartz, Notary Public. (Seal.)

[fol. 76] Upon application to the Gulf Intercoastal Conference, the following additional clause will be shown in contracts executed by a shipper having an affiliate which operates vessels and transports cargo to Pacific Coast ports to which rates named in this tariff apply.

Notwithstanding anything in this agreement to the contrary, it is understood and agreed by and between the parties hereto that Shipper may ship on vessels owned, chartered, managed and/or controlled by any affiliate of Shipper, whenever such vessels are available, it being understood that for the purposes of this agreement "affiliate" shall be deemed to mean any company a majority of the outstanding stock of which is owned, held or controlled by the corporation which owns, holds or controls a majority of shipper's outstanding stock.

Of the 1137 items contained in the tariff which had been filed with the Department of Commerce in September, 1935, effective October 3, 1935, 382 referred to the rule involved and thus became contractable items. By stipulation entered into at said hearing certain pages (2460-2555) of the record in a previous investigation held by the Department of Commerce and Docketed No. 126, which involved the question of contract rates, was made a part of the record in Docket 294.

Narrative Statement of Evidence Before the Examiner of the United States Shipping Board Bureau and Offered as Evidence at the Trial

J. K. Hiltner, Traffic Manager of the United States Pipe & Foundry Company, with general offices in Burlington, New Jersey, testified that he was very much in favor of the contract rate system which had been satisfactory to shippers and carriers. It was satisfactory to shippers because it guaranteed shippers against increases in rates on comparatively long-term contracts. He realized that one of the uncertainties facing shippers at the time of the Shipping Board Bureau investigation, in Docket 126, had been eliminated by the Intercoastal Act, 1933, but felt that there was nothing to prevent carriers from attempting to change rates filed on thirty days' notice, and that the privilege ac- [fol. 77] corded shippers of requesting suspension of rates

did not afford stability. The contract system did result in stability of rates. Most of the business of his Company is obtained as a result of bids which are put in, in many instances, weeks before the business actually materializes, and even after orders are received it is often some time before final delivery is completed. Under those circumstances the contract rate system protects the Company until the contract is completed. The contract rate system also, to a certain extent, assures a flow of traffic through the port of Mobile, and the shippers in Birmingham are dependent to a great extent upon the continuation of the service from Mobile. His Company is one of the largest users of the Gulf westbound service and ship principally through the port of Mobile. His Company had a contract with the Gulf carriers until the Order of the Secretary suspending the continuation of the practice. His Company also has contracts of a similar nature with the South American lines. There is no contract rate system in force with the lines serving the South Atlantic, but his Company did favor the installation of such a system. He has never known the Gulf lines to break one of their contracts concerning rates. He admitted that the rates on cast iron pipe had not changed much, even prior to a period of at least a year and a half before the hearing. There was a change in the rates at the time the new tariffs went into effect on October 3, 1935. The contract rate system does not prevent his Company from shipping its products through other than Gulf ports. The contract rate system guarantees continuity of operation and one of its purposes, so far as the carriers are concerned, is to force traffic to their lines, but he would not say that its effect was to exclude new carriers from coming into the trade.

E. M. Cole, Traffic Manager, American Cast Iron Pipe Company, Birmingham, Alabama, testified that he adopted [fol. 78] Mr. Hiltner's testimony as his own. He also testified that his company considers the contract system vital in the making of intercoastal rates; that as between the companies that are members of the Gulf Conference there is competition as there is a choice between the lines, and his company exercises the choice as to the companies used. He Further testified that under the terms of the contract his

company would have the advantage of any reduction which might occur in the rates during the life of the contract.

HUGO IGNATIUS, Traffic Manager of the International Paper Company and the Southern Kraft Corporation, testified that his company favored the contract system because it helped the transportation lines maintain a flow of traffic which afforded a stability of service and thus essentially lowered the lines' operating cost and gave the shipper a minimum transportation cost. His company conducts their business so that they might take advantage of the special rates offered by tramp steamers, but were willing to forego that privilege and seek contracts with the intercoastal lines. From the standpoint of his companies as shippers, the new rates effective October 3, 1935, impressed him as the full maximum of reasonableness and in some cases in excess of that. To show the scope of the transportation business, he stated that one of the Conference lines would offer a steamer one week and the other line a steamer the following week and that each required, in order to reach the minimum of operation cost, 5000 tons of cargo; that an average railroad car carries 20 tons, so that an 8000 ton ship is equivalent to 400 cars, and it is no mean trick to assemble enough freight to start four solid trains of 100 cars each, and if that amount is not assembled for a sailing, the sailing must be made regardless of the tonnage offered. He believed there should be an opportunity for the carrier to take measures to guarantee the maximum loading of a ship, and if [fol. 79] this can be accomplished by establishing contract rates, his company endorses it as a proper practice. He agreed that where tonnage is duplicated it increases competition and is a fine thing, but, unless it is properly supported by tonnage offering, it is too temporary for organizations such as he represents. He refused to state whether or not there was sufficient tonnage in the Gulf to support three lines. He advocated the contract rate system because it provided stability of service, but he agreed that under the system only the two Conference lines now operating can operate. He agreed that, if there were different rates via different lines and the rates were the basis of reasonable and free competition, "that would be the healthier situation". The use of tramp steamers and lower rates

would not be as advantageous as regular sailings at reasonable contract rates. Although under the contract the shipper does not offer any certain amount of tonnage, the carrier has the assurance of getting all the tonnage from that particular shipper. To the extent that the system is successful in keeping other carriers from establishing themselves in the Gulf, it results in a monopoly for the Conference. He did not believe that it was proper for the lines who are interested in the service to be the sole and last word as to whether additional service shall be offered, and believed it should be placed in the power of a neutral body to make that determination.

M. F. CHANDLER, on behalf of Frankfort Distilleries and eleven other distilleries of Louisville, Kentucky, testified that his companies were in favor of the contract rate system because it afforded them stabilization of rates, which is essential to the industry because of the frequent changes in the market and the length of time it takes to ship the products to the Pacific Coast. His companies ship both from the Atlantic Coast and the Gulf, and on the Atlantic Coast there is no contract rate in existence and if the rates [fol. 80] get too high, the distilleries will undoubtedly charter their own boats, which is a contingency which results in the Gulf lines needing the contract rate system more than the shipper does.

J. W. JACKSON, Assistant General Traffic Manager, National Distilleries Products Corporation, testified that his company endorsed the contract rate system because it gave them a stabilized rate, which is necessary in order to conduct their operations satisfactorily in view of the long distance to the Pacific Coast, where they have to supply their offices with prices months in advance, and the contract rate system protected them in their shipments to the Coast because it allowed them to know in advance what rate they would be required to pay. They also favored the contract rate system because it tended to preserve stability of service. They also ship by the North Atlantic lines, where they have stability of service without any contract rate system.

C. Y. Roberts, Secretary of the Gulf Intercoastal Conference, testified that during the period from January 1, 1934, to June 30, 1935, 63.7% of the total westbound port-to-port tonnage moved under the contract rate. Less than 1% of the tonnage which was entitled to the contract rate moved at the higher rate because there were no contracts covering them. The witness had received 219 letters from shippers urging a continuance of the contract rate system, and three letters from shippers who did not favor the system. The contracts entered into with the shippers covered different periods—some for a year and some for six months, but that the later practice of the Conference had been to give contracts for the shorter period. The witness had been Secretary of the Conference since April, 1930, and did not know of a single instance where the contract rate was increased during the period of the contract. When the Secretary of Commerce ordered the suspension of the practice [fol. 81] of giving rates based upon the existence of such contracts, he had sent out a circular notice of that fact to all shippers—roughly 1100—and the witness and the officers or employees of the Conference members had contacted shippers to get them to appear at the hearing or to write in about it. How many were personally contacted he did not know.

Bernard Fabrikant, Vice President of Dulien Steel Products, New York City, stated that he was opposed to the contract rate system because he found it "annoying and troublesome, as well as unnecessary." He had shipped some second-hand boiler tubes and was compelled to pay the non-contract rate because the contract which he had signed had never been received by the Gulf Intercoastal Conference. He believed that it had been mailed, but was not certain. He had sought reparation in the sum of $136.10, but the Shipping Board Bureau had ruled against him. He entered into contracts with the Conference lines subsequent to this event. He had shipped at the contract rate approximately from 500 to 2000 tons per year. He was not particularly interested in regularity of service. He was in competition with the Atlantic Coast trade and also with others in the Gulf trade and could not afford to ship at non-contract rates in competition with shippers who got contract rates.

W. M. HATFIELD, regional traffic manager of Montgomery Ward & Company, testified that his Company has large mail order houses at Oakland, California, and Portland, Oregon, and issues a general catalog twice a year in which the prices quoted therein remain in effect for a six-months period. His Company is primarily interested in the contract rate system because it enables them to know what the rate will be for at least six months. In addition to the mail order houses, his company has about 93 retail stores on the Pacific [fol. 82] Coast where service and cost are the prime factors in the distribution of merchandise. His company ships also by the Atlantic Coast lines and has had no difficulty with the service or rates via those lines, where there is no contract rate system.

ERNEST HOLZBORN, Chairman of the Gulf Intercoastal Conference, New Orleans, Louisiana, and Gulf Manager of Swayne & Hoyt, Ltd., managing owners of the Gulf Pacific Line and Managing Agents of the Gulf Pacific Mail Line, Ltd., testified that he had been in the steamship business in the Gulf since 1911 and in the Gulf Intercoastal trade continuously since 1921. Shortly after the first service was started from the Gulf through the Panama Canal, and several years after the inauguration of the Gulf Intercoastal service, the trade was seriously disrupted by rate-cutting practices and resultant rate wars which not only seriously affected the revenues of the steamship lines, but brought about very unstable conditions for shippers, who could not determine what their freight rate would be or what their competitors' freight rate would be. Considerable thought was given to the question of what should be done to bring about a stabilized condition both as to service and rates, and the action finally taken by the steamship lines was the so-called contract rate system. Various shippers also requested the inauguration of this system. The system first started in the Gulf in 1927 and remained in effect until October, 1935, except for a short period from July, 1928, to February, 1929, when the Gulf Conference had disbanded. During the period of the operation of the contract rate system it proved a very material factor in stabilizing conditions both as to service and rates. Due to the fact that a certain amount of potential tonnage is contractable, the steamship lines have knowledge of the approximate tonnage

that may be offered and can arrange their service accord-
[fol. 83] ingly. There never has been a formal complaint against the system, and, on the contrary, many shippers have expressed themselves as favorable to it. One of the largest shippers in the Gulf has voluntarily suggested that his items be made contractable. The shippers represented by 191 of the 219 letters submitted by Mr. Roberts, the Secretary of the Conference, furnished 37.9% of the contractable tonnage handled by his line; that if the tonnage carried for the American Cast Iron Pipe Company and the United States Pipe & Foundry Company, representatives of which testified in favor of the system, were added to that represented by the letters, the total would be 55.4% of the tonnage handled by his line. The three letters submitted by Mr. Roberts as received from shippers opposed to the contract rate system were from the American Cyanamid Company, which was a comparatively small shipper via the Gulf, from the National Cast Iron Pipe Company, which had violated its Conference Contract with the result that the Conference had cancelled the same and instituted suit thereon, which was pending at the time of the hearing, and from the Chrystal Springs Bleachery, whose tonnage via the Gulf was infinitesimal. A shipper has the privilege of executing a contract on one item or on as many of the contractable items in the tariff as he sees fit. Many large organizations execute a contract, or contracts, covering every contractable item in the tariff. The contract rate system applies only on westbound freight. It is a well recognized practice in the steamship trade that in order to operate successfully a line must have cargo in both directions. Conditions in the Gulf trade are such that during normal times it is possible to pick up a full cargo eastbound without much difficulty, whereas the chaotic conditions have always existed in the Gulf westbound traffic. The commodities moving eastbound to the Gulf are comparatively few, there being only about six that move in comparatively
[fol. 84] heavy volume. The experience over a period of years has shown that there has been practically little or no fluctuation in the eastbound rates to the Gulf, whereas the reverse has been the result of the westbound traffic. Due to the fact that conditions eastbound were more or less stabilized the necessity to adopt a contract system for that traffic never arose; that the chaotic conditions which existed

in the Gulf prior to 1927 resulted primarily from disagreements and fights among tramp steamers and the regular lines or between lines operating from the Gulf in competition with each other or in competition with North Atlantic and South Atlantic carriers. This chaotic condition was remedied primarily by the contract rate system. The first line in the Gulf Intercoastal trade was known as the Pacific Caribbean and Gulf Line, which subsequently became the Gulf Pacific Line. The operation was started about August, 1920. The American Hawaiian line shortly entered the service, but withdrew after a brief period. About June, 1921, the Luckenbach Steamship Company entered the Gulf trade, and Luckenbach and the Pacific Caribbean and Gulf worked in harmony to maintain the North Atlantic basis of rates until about August, 1923, when the first Gulf Intercoastal Conference was formed consisting of the two named lines. This Conference maintained no headquarters and employed no regular secretary. About 1925 the Conference collapsed due to the break-up in the North Atlantic Conference. Chaotic conditions followed and continued until the formation of what is really the parent organization of the Gulf Intercoastal Conference, which was organized in Gulfport, Mississippi, in August, 1927. The organization agreement was approved by the United States Shipping Board on October 23, 1927. The members of the Conference were the Gulf Pacific Line, Inc., Luckenbach Steamship Co., Inc., the Redwood Line and the Trans-Marine Corporation. The present Conference agreement [fol. 85] is subscribed by Luckenbach Steamship Co., Inc., Gulf Pacific Line, Inc., Swayne & Hoyt, Managing Owners, and Gulf Pacific Line, Ltd. The two lines, Gulf Pacific Line, Ltd., and Gulf Pacific Mail Line, Ltd., are very closely associated. The Gulf Pacific Mail Line, Ltd., comes into the Gulf eastbound on its own behalf and then its vessels serve the out ports of the Gulf westbound for the Gulf Pacific Mail Line, so that as to the service westbound covered by the contracts there are only two lines giving service except at small out-post ports, and as to those, Swayne & Hoyt has the control of both the Gulf Pacific Line, Ltd., and the Gulf Pacific Mail Line, Ltd. The Gulf Pacific Mail Line, Ltd., has no vote in the Conference. The first appearance of contract rates was in connection with what was then known as the westbound contract list No. 1 issued at Gulfport in

October, 1927, which was marked "for the information of members only", and was not filed with the United States Shipping Board, as the regulations of that Board required the filing only of maximum rates. Rate stability cannot be obtained by mere agreement between the carriers as there are too many outside forces over which the carriers have no control, such as the possibility of tramp operators and developments in the North Atlantic situation. During a very disastrous rate war which took place in the North Atlantic service in 1931 and resulted in extremely chaotic conditions, the Gulf Conference remained intact and generally upheld the rate structure. The witness maintained that the system did not keep any one from entering the Gulf, but admitted that "it does to a certain extent give the present lines operating there, you might say, the first shot at the tonnage". To a certain extent the contract rate system is a self-protective measure adopted by the carriers to be able to continue operations. Without the contract rate system there is great possibility that the Conference lines may find themselves unable to continue to render [fol. 86] the same service, resulting in a materially reduced operation. The shippers receive as much benefit out of the system as the carriers. The passage of the Intercoastal Shipping Act, 1933, has to a certain extent eliminated the condition necessitating the contract rate system, but not entirely. The same factors that bring about rate changes affect the items which are not contractable, as well as those which are contractable. The Conference as a whole selects the commodities which are to carry the contract rate and, generally speaking, are those that move with regularity and in large volume, although other factors influence the determination. Applications are often made by shippers to have their commodities put on the contractable list. There are commodities moving in bulk, such as corn, that are not on the contractable list. Corn was at one time on the list, but shippers of the commodity requested that it be removed, which was done; that there is really no need for having non-contractable items except that there is a certain amount of detail work required in securing the contracts and making sure that contracts are available when shipments move. He remembered one instance where shippers requested the commodity to be taken off the list so they could avail themselves of a cut-rate line. When the

contract rate system was first installed there was no fixed differential between contract and tariff rates applicable to different items and no penalty included in the contract if the shipper did ship by other lines. After filing the tariff under the Intercoastal Shipping Act, 1933, the differential of ten cents between the contract and the non-contract rate was determined to be a fair and equitable figure. It was an arbitrary figure and the shipper who pays the additional ten cents does not receive any benefit other than that he does not desire to partake of the contract system. Any and [fol. 87] all shippers have the privilege of executing a contract. Contractable and non-contractable commodities move on the same standard. No special service is rendered in connection with one commodity not carrying the contract rate over that rendered a commodity carrying the contract rate. The physical work performed on one class of shipments is the same as that performed on the other. It costs no more to move a ton of cast iron pipe for a shipper who has a contract than to move a ton of the same commodity for a shipper who does not have a contract, except that there is a certain amount of correspondence in connection with the contracts. There are no carriers operating regularly in the general cargo trade from the Gulf to the Pacific who are not members of the Gulf Intercoastal Conference. Only lines engaged in the Gulf Intercoastal trade may become members of the Conference. If a carrier were actually engaged in the service, that is, actually put a ship down there, booked cargo, loaded it, filed his rates with the Shipping Board, and sailed the vessel, he would be qualified to apply for membership in the Conference. The Conference refused the application of the Nelson Steamship Company to join the Conference. Any steamship company who knows the Intercoastal trade can get into the Gulf service if he cares to do so, but it would not be easy because the service is now adequately tonnaged, and the witness did not believe that there is or will be enough tonnage offered for three lines to be regularly employed. The existence of the contract system would be an obstacle to the successful operation of a new line in the trade, but only to a limited extent. The theoretical third line would take enough tonnage from the present Conference members to make the result felt very seriously in their revenues, probably to the

extent of reducing their service. If a new line, comparable in all respects to the Conference members, should enter the [fol. 88] Gulf service and quote rates 10% lower than those published by the Conference, the new line would not stand a good chance of success because there is not sufficient tonnage to justify another line, and the bulk of the cargo moving through the Gulf is really low grade, resulting in a low level of rates. However, if the Conference members should fail to meet the 10% reduction, the new line would have very little difficulty in keeping its ships filled in both directions. Whether or not it could successfully operate at those rates is a question. The new line would have an excellent chance under those circumstances of inducing shippers to ship with it and not renew their contracts with the Gulf Conference members. The rates published and filed as effective October 3rd were so drawn that the contract rates were on a parity, as far as possible, with the North Atlantic "B" line rates and, therefore, a shipper of contractable commodities from the Gulf is compelled to sign a contract in order to obtain the same rate as a shipper of similar commodities from the Atlantic seaboard using a "B" line service who is not compelled to sign a contract. A shipper who refuses to sign a contract pays 10 cents per hundred for the privilege of holding himself in readiness to patronize a cut-rate carrier. The signing of a contract does not preclude a shipper from shipping any tonnage he may have by rail or via the South Atlantic or North Atlantic water route. What is called "distress tonnage" is where an owner who charters a ship eastbound on the Pacific Coast to some one who does not operate regularly for a full cargo into the Gulf, and the owner or charterer is willing to take any cargo that he can secure at cut-rates, and the patrons of the Gulf Conference lines are placed at a disadvantage if the Conference lines do not meet the cut-rates. Those [fol. 89] patrons suffer losses in the event their competitors use the distress tonnage. In such case the contract shippers request the Conference lines to meet the competitive situation by reducing the rate. The issue in connection with the contract rate system appears to be between regular service and stabilized rates and a service which is subject to frequent interruption by reason of the entry of one-way tramp steamers or distress tonnage of one kind or another. Distress tonnage represents an actual danger that

has confronted the Conference lines since the enactment of the Intercoastal Shipping Act, 1933. An instance is the so-called Girdwood case, where three steamers were allowed to load and sail and temporarily filed a tariff with the Government materially reducing the rates; the company owned no steamers, had no soliciting forces to speak of, and had nothing except a sub-charter of vessels. The Conference lines to this day "have not fully lived down that black eye in the eye of the shipping public in refusing to meet those rates." A change of commodity from non-contractable to contractable does not necessarily mean a ten cent reduction. If the item is made contractable, the rate then existing may be the contractable rate and the non-contractable rate would be ten cents higher. When an item is made contractable every shipper may automatically avail himself of the contract rate by signing a contract. Port-to-port rates protected by contract have been much more stable than through all-water rates from the interior of the country due to chaotic transcontinental reductions affecting the latter. The Conference lines have a coordinated sailing schedule, whereby the lines offer a weekly service from the main Gulf ports. Stability of service is influenced by the execution of contracts because the Conference lines are thus "assured to a certain degree an approximate tonnage upon which they can bank their operations."

[fol. 90] W. B. Rudrow, Vice President of Dickmann, Wright and Pugh, General Eastern Agents for Sudden & Christenson, who are the managing agents of the Arrow Line, which is an intercoastal service operating at fortnightly intervals from the Atlantic to the Pacific Coast, testified that his organizations opposed the continuance of the contract rate system from the Gulf "for the reason that the contract system serves to create a monopoly in favor of the Gulf contract carriers". It is difficult, if not impossible, for the Atlantic lines, particularly those serving the South, "to preserve a proper relationship between the two territories". He did not see how anybody could get into the Gulf and operate the service "in the face of the westbound business having been tied up by contract." He did not think that there was enough non-contract tonnage to make the operation of a line profitable and the contract forces the

contracted tonnage exclusively to those ships holding the contracts. That if a disagreement arises with the Gulf line, negotiations are useless because it seems to be impossible to convert the Gulf line to the viewpoint of his Company; that if his Company could put a line into the Gulf service, the Gulf line would be a lot more willing to listen to reason than they are with the existing contract system. He admitted that the contract did not place any penalty upon any shipper holding a contract because of shipping by the Arrow Line from the South Atlantic, but if it were not for the contract system the Gulf would be more reasonable in regard to the question of territories, rates and practices. The Gulf Conference takes action on rates which continually affect his company, and his company desires to be able to put its ships into the Gulf service, if it cares to do so, so that it can influence the decisions of the Gulf Conference members. He refused to agree that regulations by law cre- [fol. 91] ated the same kind of a monopoly as is created by the contract system. He was not willing to state that successful operation would be possible by another line from the Gulf, even though there were no contract rate system, and admitted that it would not be in the public interest to have five or six lines operating from the Gulf to the Pacific. The United States Intercoastal Carriers had used the contract rate system for a number of years, but had discarded it in 1931 when the Conference disbanded.

F. W. S. Locke, Vice President of the Nelson Steamship Company, testified in opposition to the continuation of the contract rate system. If it had not been for the existence of that system, the Nelson line would be employing a number of idle steamers in the Gulf trade. The Nelson Company applied for membership in the Gulf Conference on March 21, 1934, on a parity of rates, but the application was refused and immediately thereafter the Gulf Conference applied to the Shipping Board for permission to change the terms of the Conference agreement, giving the members the sole right to determine the lines which should enter the trade or not, which the Shipping Board denied. On May 25, 1934, the Nelson Company again applied for membership in the Gulf Conference and on June 5, 1934, it was again denied. The Nelson Company filed a complaint with the

Shipping Board Bureau and a petition asking that the approval of the Gulf Intercoastal Conference agreement be withdrawn, but the Shipping Board Bureau denied the petition. The Nelson Company addressed a letter to the Secretary of Commerce protesting the decision and received in reply a letter from the Secretary addressed to the witness in part as follows:

"Consideration having been accorded to your petition for suspension dated September 28, 1934, of Agent Roberts, as to amended pages 258, 278, and 312, in his tariff S. B. I. No. 2, filed to become effective October 8, 1934, you are advised that such petition is hereby denied. This action is [fol. 92] without prejudice to any conclusions that may be reached in the Department's docket No. 126 and related proceedings dealing with the contract rate system being practiced by carriers parties to Agent Roberts' tariff."

Should the contract rate be declared illegal, the Nelson Company planned to operate out of the Gulf, but the Company would have no chance of surviving the trade with the contract system in effect where they could not hope to share in the tonnage that is available. They had studied the possibility of entering the Gulf at the expiration of existing contracts, but decided that they would have only a "50-50 chance" of success. When they first applied for admission to the Gulf they asked for a pool. He anticipates that there will be a marked development of business for the Pacific Coast by way of the Gulf, and the Nelson Company wants to be on the ground to share that business when it develops. The Nelson Company would expect to develop new business by taking tonnage away from the North Atlantic lines. The Nelson Company had chartered some of its idle vessels, two of them to Girdwood. The Nelson Company had filed a tariff for the Gulf in December, 1933, but withdrew it and never operated thereunder. At the time the Nelson Company filed its applications for membership in the Gulf Conference the Nelson Company had filed no tariff, but desired to subscribe to the Gulf Conference tariff. The Nelson Company had no service at that time in effect in the Gulf, but they did have offices and facilities. The Nelson Company had tried to get a contract rate in the North Atlantic, but had been unsuccessful. The Nelson Company has a fleet of about 31 vessels, 12 of them in their intercoastal

fleet, only six or seven of which are being operated. When they participated in the pool in the North Atlantic they operated four vessels. The witness believed that the approval of the contract rate system in the Gulf service would [fol. 93] lead to its establishment in the North Atlantic; that the contract rate system would be of advantage to some of the very large carriers, but it would not be in the interest of the smaller carriers.

Exhibit 2

Exhibit 2 introduced at the trial consisted of copies of letters from shippers heretofore referred to in the testimony and received by the Conference as a result of a letter sent and contacts made by the Gulf Intercoastal Conference. A copy of the letter sent out by the Gulf Intercoastal Conference is part of Exhibit 2 and is as follows:

"As you know present contract rates published in Gulf Intercoastal Westbound Freight Tariff No. 1-A, SB-I No. 2, expire October 2, 1935.

"The Conference has published a new Tariff known as Gulf Intercoastal Conference Westbound Freight Tariff No. 1-B, SB-I No. 3 (cancelling 1-A, SB-I No. 2) to become effective October 3, 1935, which Tariff also publishes contract rates.

"The purpose of this communication is to advise you that the United States Shipping Board Bureau, Department of Commerce, has suspended until February 3, 1936, Rule 53 of the Tariff, which contains contract provisions, and has likewise suspended the reference to contract rule reading, 'See Rule 53,' wherever this reference appears in rate items of the Tariff.

"During the period this suspension order is in effect, or until February 3, 1936, unless otherwise ordered by the Department, the rates and charges, published in rate items which contain the reference, 'See Rule 53,' will apply on the commodities as named in such items without necessity of shipper or consignee executing contract with the Conference. In other words, during the period the suspension order is in effect, there will be no contract rates applicable via Gulf Intercoastal Conference lines, and rates carrying

the reference, 'See Rule 53,' will apply as open or non-contract rates."

There were letters from 218 different shippers, 215 of which advocated the continuance of the contract rate system and three of which advocated its discontinuance. The following quotations are taken from certain of the letters:

[fol. 94] From S. L. Felton, General Traffic Manager of the Acme Steel Company, Chicago, Illinois:

"We regret very much this action of the Shipping Board since contract rates have always been a matter of satisfaction to us in negotiating for business for future delivery on the Pacific Coast. The existence of these contract rates had a very stabilizing effect and we are indeed sorry to have the Shipping Board interfere with a practice that has been satisfactory for so many years and to which the trade has become accustomed."

From C. A. Mazzuchelli, Carus Chemical Company, La-Salle, Illinois:

"These contract rates have been quite an assistance to us in obtaining business on the west coast for definite tonnages, as otherwise our movement would have been very, very small and no doubt much of it would have gone to European competitors."

From The Cotton Buckle and Tag Company, Memphis, Tennessee:

"We have always been favorable to contract rates as used by the Gulf Intercoastal Conference for a number of reasons, chief of which are:

(1) We can count on a regular maintenance of sailing schedules to our Pacific Coast customers with scheduled arrivals of which we can advise our customers in advance.

(2) In placing business we can know what our freight haul is going to cost, and can maintain a more definite and less fluctuating quotation list, without last minute changes of price that irritate the buyer."

From A. Hardaker, President of The Hardaker Company, New Orleans, Louisiana:

"We have been operating under contract system for a number of years on our shipments of Rosin, Brewers Pitch, and Pipe Line Coating Pitch. We have received splendid service, regular sailings, and under contracts we are assured of a fixed freight rate for a long period of time."

From D. L. McDonald, Vice President of A. Y. McDonald Mfg. Co., Dubuque, Iowa:

"Our experience has proven that such a method provides for stability in service and rates that it guarantees a protection against increases or changes which, naturally, is very helpful to us in our Pacific Coast business. It also appears to us to be a definite base on which the water lines can provide dependable service and equipment so necessary to shippers generally."

[fol. 95] From R. E. Savage, Traffic Manager of Tea Garden Products Company:

"For many years we have held a Gulf Intercoastal Contract and have found this tends to stabilize the rate structure and provide adequate frequent service from the Gulf, and in addition enables us to know in advance a certain rate over a given period."

From The Sherwin-Williams Co., Cleveland, Ohio:

"In view of the fact the writer is not able to attend the hearing, we ask that you accept this communication meaning we are greatly in favor of the contract and feel that there should be a tremendous appeal for reinstatement of same.

"We are located at five different points on the Pacific Coast. We are located at nine different points on the Gulf. It is impossible for us to set up any costs without a definite figure based upon a contract for a certain period with the steamship line. Should we go along and not be able to determine our actual costs it only means someone is going to have to pay for the fiddler.

"I feel in addition to this, that a contract is something we have been accustomed to and is contributory to the tonnage handled. It also gives the steamship line evidence of the possible tonnage and they therefore, can set up their program accordingly.

"We do not feel that the contract system is one which is discriminatory but evidence of good faith of the steamship line in the shippers."

From American Cyanamid Company, New York:

"Replying to your letter of August 6, with which you enclosed extension of contract, and referring to your letter of July 15, we are of the opinion that the Shipping Board was correct in condemning the contract and non-contract rate practice and we think such practice is unlawful.

"The Shipping Board finally decided this matter on July 3, and we think that much of this decision is sound and would be disposed to oppose any efforts to change it."

From Crystal Springs Bleachery, Chickamauga, Georgia:

"We have your letter of the 3rd enclosing extension agreement in connection with the Gulf Intercoastal Conference contract, which expires on June 30th.

"We were aware of the fact that the examiner of the United States Shipping Board Bureau recommended that the contract rate system be abolished, and as a matter of fact, we are in accord with this recommendation, as we do not believe it is a proper procedure to follow."

[fol. 96] EXHIBIT 3

Exhibit 3 introduced at the trial consisted of the pages of the transcript in Docket 126 heretofore referred to as made a part of the record of the proceedings in Docket 294. The testimony contained in these pages, other than that which is a duplication of that heretofore set forth, is substantially as follows:

ERNEST HOLZBORN, on behalf of the Gulf Pacific Line, testified that the contract system was adopted to secure stability and also as a protection against tramp steamers. At the expiration of a contract period the Gulf Conference holds a meeting and decides what action it will take toward the extension of the contractable items. It revises the tariff, provides for the new expiration date, and new contracts are then sent to shippers and consignees of record

holding contracts. The Conference generally circularizes its entire mailing list of some 17,000 names, calling attention to the fact that the contractable items have been extended and that the members can secure contracts through application to representatives of any of the Conference lines or to the Conference direct. If a shipper claims to have executed and mailed a contract, but the Conference has not received it, the Conference would have no alternative except to protect the tariff rate by collecting the higher amount and suggest that the shipper file a reparation claim. Under those circumstances, the Conference would recommend to the Government the payment of such claim, as it has done in the past. Although some of the traffic from the Gulf moves under through all-water rates with the barge lines and some under rail-ocean rates with the railroads and some under rail-barge-ocean rates and some under port-to-port rates, the contract rate system applies only to that moving port-to-port. The Conference agreement allows any member to charter for full cargoes in the Gulf Inter- [fol. 97] coastal trade, but such charters shall in each case be subject to Conference approval, but not necessarily in accordance with the Gulf Intercoastal Conference common carrier tariffs on file with the Shipping Board. This clause was added to enable the Gulf lines to protect themselves against full cargo charters in the Gulf trade, particularly movements of grain, where companies were chartering in one direction for a full cargo of grain and the boats would be thrown on the berth westbound in the general cargo market. Under such circumstances, the Gulf lines would ascertain as far as possible the approximate rate that the outside steamer was quoting and then decide whether or not they would meet that competition. Having decided to do so, the rate would then be filed with the Government. The Gulf Pacific Line was at that time operating six steamers in the Gulf Intercoastal trade and the Pacific Mail Line was operating three. Three or four vessels were then laid up. Luckenbach was operating six in the Gulf trade. The Gulf Pacific and the Gulf Pacific Mail Line have had three or four steamers tied up for two or three years and have been anxious to get at least one of these vessels back to the Pacific Coast, but have not been able to secure sufficient excess cargo for that purpose. The contract rate system does not necessarily fix the minimum or contractable commod-

ities because there have been many times that the contract rate has been reduced and the shipper was immediately notified that his rate was automatically reduced. The contracts apply to Lake Charles and a shipper can elect to ship by Lake Charles at any time. There are items in the tariff which move in a very heavy volume which are not contractable, such as bulk sulphur, bulk corn, soil pipe, agricultural implements, and hardwood lumber. The Gulf Pacific Line and Gulf Pacific Mail Line have always followed the policy of developing cargo through ports which would justify the [fol. 98] service, and when Lake Charles can offer sufficient cargo to justify an increase in the service, the lines are prepared to put on increased service. During three or four years of operation into the port of Lake Charles there has only been enough business to justify one sailing per month, and recent reductions in the principal commodities offered, namely, rice and hardwood lumber, moving through that port hardly justify a continuation of a monthly service.

C. D. Arnold, on behalf of the Board of Commissioners of the Lake Charles Harbor & Terminal District, testified that he was opposed to exclusive contracts on the ground that it would prevent tonnage being secured by any new service that was coming into the Gulf and that might help develop the district.

J. K. Hiltner, Traffic Manager of the United States Pipe and Foundry Company, Burlington, New Jersey, testified in favor of the contract rate system and stated that he believed his company was the largest user of the Gulf Intercoastal Conference service westbound; that most of the business of the company is with municipalities or public service companies, which is taken on competitive bids and the contract may not be let for two months after the bid is opened; that his company is the largest manufacturer of cast iron pipe in the world.

E. N. Cole, Traffic Manager of the American Cast Iron Pipe Company, Birmingham, Alabama, testified that the

movement of cast iron pipe out of Alabama manufacturing territory through the Canal via the Intercoastal lines to the Pacific Coast is approximately 120,000 tons per year. His company has had experience with all types of steamship service, both tramps and regular lines, and the service and [fol. 99] rates never became well established until 1924 or 1925, when two reliable lines entered the Intercoastal service from Gulf ports. His company made independent contracts with the sepaprate lines which protected his company with a maximum rate and this practive grew into the contract rate system offered by the Gulf Intercoastal Conference. His company has found this system entirely satisfactory and a protection which it does not want to see eliminated. Between 30 and 60 days generally intervene between the time his company signed a contract and the date of deliveries and his company has never found difficulty in agreeing with the carriers for extension of contracts on rates and has never had any controversy with the lines over the contracts.

A. J. Ribe, on behalf of the National Cast Iron Pipe Company, Birmingham, Alabama, testified that his company was absolutely opposed to the contract system on cast iron pressure pipe for the reason that they found it impossible to operate under that system, and he believed his company had been effectively excluded from the Gulf and the two Gulf lines. His company had had a contract with the Conference lines in 1933 and in August of that year his company was quoted a rate by the Girdwood Shipping Company on 1,000 tons of pressure cast iron pipe 65 cents a ton lower than the Conference rate with the advice the company would establish a monthly service through December; in accordance with its contract with the Gulf Intercoastal Conference, his company notified the Conference lines of the quotations and those lines refused to meet it so his company shipped approximately 1,000 tons over the Girdwood line. In September, 1933, his company offer four to six loads of pipe to the Gulf line and in reply received a telegram stating that the Gulf line would deliver the tonnage at the minimum contract rate, but reserved the right, if the Conference contract had been violated, to bill the shipper [fol. 100] later for the difference between the minimum rate and the tariff rate in accordance with the Conference con-

tract. Subsequently the Conference wrote his company cancelling the contract. Thereafter he made one offer of tonnage at the contract rate, but the Conference refused to accept it except at the non-contract rate. Since that time they have made no shipments through the Gulf, but are shipping through the South Atlantic. The Gulf lines have presented under-charge bills on all shipments made over those lines during the contract period, but his company has refused to pay them. His company is opposed to the contract system because of that experience and also because it believes that the stability of rates would be insured by the Intercoastal Shipping Act, 1933. When his company shipped by the Girdwood line, it had been informed that there was a controversy as to whether that line was authorized to operate out of the Gulf. His company could never get the Gulf line to state who was to judge as to whether or not the contract had been violated. He is now familiar with the fact that the Shipping Board held that the Girdwood company was not a common carrier, but that that holding was made under the Shipping Act of 1933, while his company's contract was made before that Act was passed. His company did not investigate the reliability of the Girdwood Company, but had the assurance of that company that it would operate monthly for three or four months. His real purpose of using that company was to secure a lower rate. He understood that under the terms of his contract with the Gulf Intercoastal Conference and a rider thereto that if a line offered a less rate than the going Conference line rate, it should be offered to the Conference line, and if its line did not accept the lower rate, he was at liberty to accept the lower rate from the other line.

[fol. 101] EXHIBIT 4

Exhibit 4 introduced at the trial consisted of copies of five actual contracts by the Gulf Conference lines and shippers. Included among them was the following:

"Contract No. 1307

"Memorandum of Agreement made this 16 day of March, between California & Hawaiian Sugar Refining Corp., San Francisco, Calif., hereinafter called the Shipper, and the

several steamship lines undernamed, which constitute the Gulf Intercoastal Conference, hereinafter called the Carriers, Witnesseth:

"1. the Shipper, in consideration of the agreement of the Carriers hereinafter set forth, agrees to ship by steamers of the Gulf Intercoastal Conference Lines operating from the ports of Beaumont, Texas, Houston, Texas, Lake Charles, Louisiana, Mobile, Alabama, New Orleans, Louisiana, and other Gulf ports, all of the water-borne shipments, which the Shipper shall make between the date hereof and June 30th, 1934, inclusive, from the aforementioned ports, and any and all other United States Gulf ports to the following United States Pacific Coast terminal ports:

Alameda, California, Los Angeles Harbor, Calif., Oakland, California, Portland, Oregon, San Francisco, California, Seattle, Washington, Tacoma, Washington,

and all other Pacific Coast ports, subject to paragraph 6 hereof, of the commodities hereinafter described, quantities being estimated at approximately 15 carloads of 300 net tons.

"The shipments contemplated in this clause shall include not only any such shipments made directly by the Shipper and in its name, but also any such shipments, however and by whomsoever made, if for the benefit and on behalf of the Shipper.

"2. The Shipper has the option of selecting from such steamers of the Carriers as shall be operated from the port of shipment, the steamers upon which the shipments are to be made, subject, however, to mutual agreement between the Carrier so selected and the Shipper as to the quantity per steamer, the port or ports of loading, and port or ports of discharge.

"The booking contract for the carriage of the commodities covered by this agreement is to be individually with the Carrier specially agreeing to transport same, and not with the Carriers generally, and the shipment shall be subject to all the terms, conditions, and exceptions expressed in the freight contract, permits, dock receipts, mate's receipts, and regular form of bill of lading of the transporting Carrier in use at the time of shipment.

[fol. 102] "3. In consideration of said agreement of the Shipper, the Carriers agree to transport from the loading

ports specifically named above and from such other loading ports in the United States Gulf at which their steamers may call (provided space is available when application is made therefor), to the Pacific Coast terminal ports of discharge above named and all other United States and Canadian Pacific Coast ports for which cargo may be accepted, subject to paragraph 6 hereof, all of said shipments, and at the following rates by all Carriers named herein:

"On commodities described in Items of the Gulf Intercoastal Conference Westbound Freight Tariff No. 1, S. B. I. No. 1, as amended or reissued, viz.:

261

"(See attached for commodity description, carload minimum weight and rate.)

Effective March 20, 1934

"4. If the Shipper shall make any shipments in violation hereof, this agreement shall immediately become null and void as to all future shipments, and thereupon the Shipper shall be liable to the transporting Carriers for payment of additional freight on all commodities heretofore shipped with such Carriers since the execution of this agreement, at the tariff non-contract rate or rates of the transporting Carriers in force on such commodities at the time of such shipments.

"5. In applying the rate or rates named herein the date of the dock receipt shall govern on traffic originating locally at the port of loading, and the date of the initial Carrier's bill of lading shall govern on traffic from the interior.

"6. This contract is subject to the rules and regulations of the Gulf Intercoastal Conference Westbound Freight Tariff No. 1, S. B. I. No. 1, as amended and reissued and in effect on the date hereof.

"For and on behalf of the Carriers:

Gulf Pacific Line, Gulf Pacific Mail Line, Ltd., Luckenbach Gulf Steamship Company, Inc., Gulf Intercoastal Conference, by (Sgd.) C. Y. Roberts, Secretary.

California and Hawaiian Sugar Refining Corp'n., Ltd., (Shipper), by (Sgr.) J. G. Breslin, (Address:) San Francisco."

[fol. 103] (The following is the commodity description which was attached to the Memorandum of Agreement:)

"Item 261

Bagging, cotton, clayed or unclayed, bleached or unbleached.

Rates—50¢ per 100 lbs. for carload min. wt. 24,000 lbs.
40¢ per 100 lbs. for carload min. wt. 40,000 lbs.

Subject 3% surcharge."

Exhibit 5 introduced at the trial was a copy of the Gulf Intercoastal Agreement which reads as follows:

Exhibit 5

[fol. 104] Department of Commerce,

U. S. Shipping Board Bureau, Washington

Gulf Intercoastal Conference Agreement

U. S. Shipping Board Bureau Agreement Number 2742. Dated: January 22, 1934. Filed: January 24, 1934. Approved: March 28, 1934

Conference Membership as of March 28, 1934

Luckenbach Gulf Steamship Company, Inc.

Gulf Pacific Line, Swayne & Hoyt Ltd. (Managing Owners)

Gulf Pacific Mail Line Ltd.

C. Y. Roberts, Secretary, Room 206, Annex, Board of Trade Building, New Orleans, Louisiana

[fol. 105] Gulf Intercoastal Conference Agreement

This Memorandum of Agreement, made in the city of New Orleans, La., by and between the parties signatory hereto, on the 22nd day of January, in the year One Thousaid Nine Hundred Thirty Four.

Witnesseth:

That the parties, common carriers by water, engaged in operating general cargo vessels in the Gulf Intercoastal

trade of the United States of America, hereby associate themselves together in a Conference to be known as Gulf Intercoastal Conference, to promote commerce between Gulf ports of the United States and Pacific Coast ports of the United States, as named in Gulf Intercoastal Conference tariffs filed with the United States Shipping Board Bureau of the Department of Commerce, for the common good of shippers and carriers, by establishing reasonable rates and charges for the transportation of merchandise, and by providing just and economical cooperation between the steamship lines operating in said trade, and to the accomplishment of that end, the parties hereby severally agree with each other as follows:

1. The members of the Conference shall charge and collect all freight and other charges for the transportation of merchandise carried by them and/or by any vessels owned, chartered and/or operated by them or for which they may act as Agent, between the aforementioned ports, in currency of the United States of America, or its equivalent, on actual gross weight or measurement of the cargo, strictly in accordance with the rates, divisions and charges and Rules and Regulations which may be adopted by the Conference, and filed with the United States Shipping Board Bureau of the Department of Commerce.

2. The members of this Conference shall be governed by the rates, rules and regulations as set forth in the Conference tariffs lawfully on file with the United States Shipping Board Bureau of the Department of Commerce, Washington, D. C. In the event any member of the Conference elects to depart form the rates, rules or regulations of the Conference by filing an independent tariff with the United States Shipping Board Bureau of the Department of Commerce its membership in this Conference shall automatically cease as of the date said tariff is filed. No member, however, may so file an independent tariff without first serving notice in writing on the Conference not less than four months before filing such independent tariff, such notice to be handed to the Chairman or Secretary of the [fol. 106] Conference at New Orleans, Louisiana.

No termination of any Carrier's membership in the Conference is to become effective, however, until cancellation of such Carrier's participation in this Agreement has been

filed and approved in accordance with Section 15 of the Shipping Act.

3. The members of the Conference shall not unjustly discriminate against, and shall make no discount, payment, rebate, or return of any description, directly or indirectly, to any shipper, contractor, broker, consignee, or other receiver of cargo; and shall not employ any person, firm or corporation, as a representative to whom or to which the payment of compensation will serve as a payment, rebate, refund, or preferential consideration in violation of the spirit of this agreement or of the law. The payment of freight brokerage is in violation of this agreement.

4. The members of the Conference will abide and the Conference shall be governed by rules and regulations unanimously adopted by the members, and as provided for in Appendix A attached hereto. No change nor addition to these rules and regulations may be made except by unanimous consent of all the Members. A majority of the members of the Conference shall constitute a quorum at any regularly called meeting. Any proposal except a proposal to change this agreement or the rules and regulations of the Gulf Intercoastal Conference shall be considered adopted on affirmative votes of a majority of the members of the conference. It is agreed and understood that the Gulf Pacific Mail Line is without voting power.

Any member desiring to bring up for discussion at any meeting of the Conference any proposal whatsoever shall give notice in writing to the Secretary of the Conference at New Orleans in case the proposal pertains to Westward movement, or to the Secretary of the Pacific Coast Committee of the Conference at San Francisco, in case the proposal refers to an Eastbound movement, not later than eleven (11) A. M. of the third business day preceding the day of the meeting; and the Secretary shall thereupon docket the matter, and any other matter which he desires to bring before the Conference, and give written notice thereof to each member not later than five (5) P. M. of the third business day preceding the day of such meeting. Subjects so docketed for discussion shall be dealt with in the order in which they are received by the Secretary, but the Chairman shall be privileged to change the order of the subjects if, in his judgment, such change will be in the interest of progress and for the common good.

In case any such proposal is not approved by the Conference within fifteen (15) days after its receipt by the Secretary, the proponent member shall have the right to refer such proposal to the executive officers of the other Conference members who shall within fifteen (15) days notify the Secretary of action which they desire to take. The Secretary shall inform the proponent member of action taken by the executive officers as advices are received and in case such proposal is not approved by the executive officers of a majority of the Conference members within [fol. 107] fifteen (15) days after reference to them, the proponent line shall have the right on not less than forty-five (45) days' written notice to the executive officers of the other Conference members, to put such proposal into effect, by publication in the appropriate Conference tariff. It is agreed and understood that the Executive Officers of the Gulf Pacific Mail Line shall not be considered as a qualified vote, as that line is without voting power.

If all of the members are present at any meeting and all agree, action may be taken on any matter within the province of the Conference without prior notice thereof. Matters docketed for discussion shall have precedence over other matters, subject always to the ruling of the Chairman.

5. The Conference may meet with any other approved Conference for the purpose of discussing and agreeing upon any and all matters (including rates of freight) of mutual interest, provided no agreement within the purview of Section 15 will be effective until approved by the United States Department of Commerce.

6. Any person, firm or corporation engaged in said Intercoastal trade may hereafter become a party to this agreement by the consent of a majority of the parties hereto by affixing his, their or its signature hereto. Such admission for membership in this Conference, on official application, shall not be denied to any party except for just and reasonable cause; further, no such admission to membership is to be effected until modification recording same has been filed with and approved by the United States Department of Commerce. In the event of a change in the number of members of the Conferenee there shall be a meeting within two weeks thereafter for the purpose of amending all terms and rules of the agreement covering voting.

7. This agreement shall become valid and binding on the date of its approval by the United States Department of Commerce, in accordance wit hthe provisions of Section 15 of the Shipping Act of 1916. Unless such approval of the United States Department of Commerce shall be withdrawn, this agreement shall remain in effect indefinitely, with the right of any member or members to withdraw from the Conference on four months' notice in writing to be handed to the Chairman or Secretary and filed with the United States Department of Commerce, such member or members to be bound by all the terms and conditions of this agreement until the expiration of the four months. This agreement shall not be changed except by unanimous consent of all the members.

8. This agreement, if and when it is approved by the United States Shipping Board Bureau, Department of Commerce, shall cancel and supersede Conference Agreement No. 122, dated February 8, 1929, and approved February 19, 1929, and modifications thereof.

9. No vessel owned or controlled by any member of this Conference or by a parent, subsidiary, affiliated or associated company or organization shall be permitted by any [fol. 108] of them to operate whether under charter or any other arrangement in the trade covered by this Conference, except in accordance with Conference rates, rules and regulations; nor shall any such vessel be permitted by any member or other party of aforesaid to operate in any other branch of the intercoastal trade except in accordance with the rates, rules and regulations prescribed under such Conference Agreement (approved under Section 15 of the Shipping Act) as covers such other branch of the intercoastal trade.

In Witness Whereof, the parties hereto have caused this agreement to be executed by their respective officers or agents thereunto duly authorized, the day and year first above written.

Luckenbach Gulf Steamship Company, Inc., per (Sgd.) Oliver P. Caldwell, F. T. M. Gulf Pacific Line, Swayne & Hoyt Ltd. (Managing Owners), per (Sgd.) C. W. Cook, Vice President. Gulf Pacific Mail Line, Ltd., per (Sgd.) C. W. Cook, for Vice President.

[fol. 109] APPENDIX A

Rules and Regulations of the Gulf Intercoastal Conference

The members of the Gulf Intercoastal Conference will abide, and the Conference shall be governed, by the following rules and regulations:

1. Chairman.—The members shall designate from amongst their number suitable persons to preside over the Conference, a Chairman and Vice-Chairman who shall serve without compensation for a period of three (3) months or until their successors are elected. In the absence of both the Chairman and Vice-Chairman at a meeting where a forum is present, the members present shall elect from among their number a Chairman for that specific meeting only.

2. Secretary.—The members shall appoint a Secretary to be compensated as agreed, who shall keep a minute record of all meetings of the Conference and its Committees, and furnish to each member copies of all records and regulations of the Conference. He shall also compile, publish and distribute copies of tariff and supplements thereto to the public and members at such reasonable charge as may be determined by the Conference. The Secretary shall collect all assessments from the members and pay the expenses of the Conference therefrom and record the accounting when and as directed by the Conference and shall otherwise act in accordance with the directions of the Conference and the Chairman thereof.

3. Meetings.—The Conference shall meet regularly on the first and third Tuesdays of each month at eleven A. M. at New Orleans. If any meeting falls on a legal holiday, the meeting shall be held at the same hour and place on the next business day. Special meetings to consider emergency questions shall be called by the Secretary at the request of any member, provided a quorum of members signify their willingness to attend. No special meeting shall be held on less than three days' written notice, without the unanimous consent of all the members of the Conference. The Secretary in calling a special meeting, shall notify the members the name of the line or lines requesting it and the reason therefor. Action taken at special meetings is binding upon

absentees the same as at regular meeting, but nothing can be brought up for consideration at special meeting except that for which it is called, unless the entire membership is present and unanimous consent is given.

4. Rate Changes—Method of Promulgating Advice Thereof.—Except when otherwise specifically authorized, advice of changes in rates and/or tariff rules shall not be promulgated by any member representative until the following day. Advices of such changes are to be dispatched by collect night letters by the Secretary to designated offi- [fol. 110] ces of respective lines who are then free to inform the public.

5. Voting Power.—Each member line, except Gulf Pacific Mail Line, present at any meeting shall be entitled to a single vote on all matters to be decided by a vote of the Conference.

6. Definition of the Term Member.—Where a company, firm or person operates under its, their or his own name or a trade name, the word member, as used in these rules, means such company, firm or person, but where a group of companies, firms or persons operate under a common trade name, then the word member means such group taken collectively.

7. Representation.—Each member line shall appoint an official to represent it at all meetings with full power to vote on all matters and at the same time appoint alternates who will attend and act in the absence of the first named. A member may be represented by proxy authorized in writing and whose authority must be specific as to power.

8. Voting Rule and Quorum.—Except as otherwise provided, the members of the Conference shall abide and the Conference shall be governed by a majority vote of the members present, provided, however, these rules and regulations shall not be changed except by unanimous consent of the Conference. A majority of the members of the Conference shall constitute a quorum at any regularly called meeting of the Conference.

9. Absorptions.—The members shall not, directly or indirectly, absorb at loading or unloading ports, or elsewhere, cartage, lighterage, tollage, wharfage, switching,

car-loading or unloading or connecting carrier's freights, except as may be provided for in tariffs and it shall be in direct violation of Conference rules and practices for a member to maintain any station warehouse or other facility for receiving or accepting cargo, except that at which carrying steamer berths for loading.

10. Conference Expenses.—The expenses of the Conference shall be borne by the respective members in the proportion that the Westbound cargo tons carried at Conference rates by each member bears to the total cargo tons carried at Conference rates by all the members, and for the purpose of determining the month in which a sailing has taken place, the date of departure from the final Gulf port of loading shall be the determining factor. At the end of each three months' period, the Secretary shall prepare a statement prorating the expenses incurred during such period to the members on said basis. Eastbound cargo shall not be included for the purpose of ascertaining proportion of expense due from each Conference member. Expenses shall be prorated on basis of total Westbound cargo. For the purpose of creating an expense fund, each member shall make an initial contribution to the Secretary of Five Hundred Dollars ($500) and such supplemental contribution as may be necessary to keep the Secretary in funds to meet all expenses. Upon the rendition of such periodic statement, each member shall pay to the Secretary a sum sufficient not only to meet its prorata of the expenses as shown by the statement, but to maintain with the Secretary a credit of Five Hundred Dollars ($500) in the expense fund. Failure by any member to pay any assessment or its share of the [fol. 111] expenses within fifteen (15) days after written request by the Secretary, shall render such member in arrears.

11. Rules of Procedure.—Unless otherwise provided, meetings shall be conducted in accordance with Roberts' Rules of order on Parliamentary Procedure.

12. Publicity.—The Secretary and the Chairman shall constitute a Publicity Committee for the Conference.

13. Eastbound Trade.—A Pacific Coast Committee of the Conference, composed of one representative of each of the member lines, shall be located at San Francisco. The com-

mittee shall have absolute authority with respect to Eastbound tariff rates, charges, rules and regulations, and its action shall be governed by a majority vote of the members of the Conference.

14. Divisions of Rates.—The rates and divisions thereof as now carried in Federal Barge Line Tariff 60-H and Mississippi Valley Barge Line Company's Tariff 4-A and current supplements thereto, or re-issues thereof, are to be subject to Conference action, except that existing divisions and rates are to remain in effect until changed. This also applies to any other joint tariffs in which any member may now or hereafter concur.

15. Differential Rates.—In the event cargo insurance rates impose any traffic disability upon any line member of the Gulf Conference as compared with any other Gulf Conference line, said line suffering disability shall be allowed to offset such disability by payment of actual difference, but shall report each case to the Conference Secretary with original paid Insurance bill and the Secretary shall notify all other members of absorptions made under this paragraph.

16. Executive Officers and Alternates.—Each member of the Conference shall designate an executive officer on whom notice provided by Article 4 of the Conference Agreement may be served, also an individual to represent it at meetings of the Conference and of the Pacific Coast Committee thereof, with an alternate for each. Advice of nominations, and changes, if any, shall be given to the Secretary in writing.

17. The Conference may meet with rail carriers and/or their bureaus or rate making bodies or with inland water carriers for the purpose of discussing and establishing and publishing in a manner required by law such joint through rates as may from time to time be found necessary to encourage the movement of merchandise via rail and water or all water or rail, water and rail from points in the interior.

18. Any Member line of this Conference may charter to others any vessel owned or controlled by itself, or by its parent, subsidiary or affiliated companies, for full cargoes in the Gulf intercoastal trade. Such charters, including rates and terms, shall in each case be subject to Conference

approval, but not necessarily in accordance with the Gulf Intercoastal Conference common carrier tariffs on file with the United States Shipping Board Bureau, Department of Commerce. Such charters shall not be considered a violation of Conference agreement.

[fol. 112] No additional evidence was offered by either party.

Be it Remembered that the foregoing contains the substance of all of the evidence given at the hearing on this cause, and this Statement of Evidence is duly approved and signed, and ordered to be made of record in the above entitled cause, this 19th day of October, 1936.

D. Lawrence Groner, Justice, United States Court of Appeals for the District of Columbia. Alfred A. Wheat, Chief Justice, District Court of the United States for the District of Columbia. James M. Proctor, Justice, District Court of the United States for the District of Columbia.

We consent to the foregoing Statement of Evidence.
Elisha Hanson, Eliot C. Lovett, Frank Lyon, Attorneys for Plaintiff. United States of America, by Leslie C. Garnett, U. S. Attorney. H. L. Underwood, Ass't U. S. Atty. Ralph H. Hallett, Attorney, Department of Commerce.

[fol. 113] In Supreme Court of the United States

Statement of Points and Designation of Record—Filed October 29, 1936

Come now the appellants, and pursuant to the provisions of Paragraph 9 of Rule 13 file this statement of points and designation of record.

Statement of Points

The appellants rely upon the points stated in their assignment of errors and therefore adopt those points as the statement of points upon which they intend to rely in accordance with the rule.

DESIGNATION OF RECORD

The appellants request that the Clerk cause to be printed the entire record, except such parts thereof as, pursuant to the usual practice, are omitted.

Respectfully submitted, Swayne & Hoyt, Ltd. (Gulf Pacific Line), Gulf Pacific Mail Line, Ltd., Luckenback Gulf Steamship Co., Inc., by Elisha Hanson, Eliot C. Lovett, Frank Lyon, Their Attorneys.

[fol. 114] Receipt of a copy of the foregoing Statement of Points and Designation of Record is acknowledged this 29th day of October, 1936.

United States of America, by Stanley Reed, Solicitor General of the United States. (A. I.)

[fol. 115] [File endorsement omitted.]

Endorsed on cover: File No. 41,034. District of Columbia, D. C. U. S. Term No. 494. Swayne and Hoyt, Ltd., Gulf Pacific Mail Line, Ltd., and Luckenbach Gulf Steamship Company, Inc., appellants, vs. The United States of America. Filed October 28, 1936. Term No. 494, O. T., 1936.

(8484-C)

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Statutory provision sustaining jurisdiction	1
The order the validity of which is involved	2
Dates of decree and of presentation of application for appeal	3
Nature and significance of the case, and the jurisdiction of the proceedings	3
Cases believed to sustain the jurisdiction	6
Opinion below	6
Appendix "A"—Opinion of the District Court of the United States for the District of Columbia	8

Table of Cases Cited.

Baltimore & Ohio Railroad Company v. United States, 264 U. S. 258	6
Humphrey v. U. S., 295 U. S. 602	6
Isbrandtsen-Moller Co., Inc., v. United States, No. 307, October Term, 1936	6
Panama Refining Company v. Ryan, 293 U. S. 388	6
Schechter v. United States, 295 U. S. 495	6
United States v. Illinois Central Railway, 263 U. S. 515	6

Statutes Cited.

Constitution of the United States, Article I, Section I, Clause 18	5
District Court Jurisdictional Act (October 22, 1913, c. 32, 28 U. S. C. 47, 38 Stat. 220)	5
Economy Act of June 30, 1932 (47 Stat. 413), as amended March 3, 1933 (47 Stat. 1518), 5 U. S. C. 126	5
Executive Order No. 6166, promulgated June 10, 1933, effective August 10, 1933	5
Judicial Code, Section 24 (28 U. S. C. 41 (28))	5
208 (28 U. S. C. 46)	5
209 (28 U. S. C. 45)	5
Shipping Act of 1916, Section 15 (46 U. S. C. 814, 39 Stat. 733)	3
Section 31 (46 U. S. C. 830, 39 Stat. 738)	2
United States Code, Title 5, Section 126	5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 494

SWAYNE & HOYT, LTD. (GULF PACIFIC LINE), GULF PACIFIC MAIL LINE, LTD., AND LUCKENBACH GULF STEAMSHIP COMPANY, INC.,

Appellants,

vs.

THE UNITED STATES OF AMERICA.

STATEMENT AS TO JURISDICTION ON APPEAL.

Pursuant to Rule 12, this statement is filed disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review on appeal the decision herein of the District Court of the United States for the District of Columbia.

I.

Statutory Provision Sustaining Jurisdiction.

Section 207 of the Judicial Code, as amended (U. S. C., Tit. 28, Sec. 47), provides, *inter alia*, for an appeal to the Supreme Court of the United States from interlocutory

injunctions, and from decisions upon final hearing, as to orders of the Interstate Commerce Commission. That part of the statute providing for appeal reads as follows:

> "* * * An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply." (Act of Oct. 22, 1913, c. 32, 38 Stat. 220.)

This provision of the law is made applicable to orders of the United States Shipping Board (now United States Shipping Board Bureau, Department of Commerce), such as here involved, Section 31 of the Shipping Act, 1916 (U. S. C., Tit. 46, Sec. 830; 39 Stat. 738), providing as follows:

> "The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the Board shall, except as herein otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties." (Act of Sept. 7, 1916, c. 451, #31, 39 Stat. 738.)

II.

The Order the Validity of Which is Involved.

These proceedings seek to set aside, annul, and enjoin the enforcement of, an order of the Secretary of Commerce entered on January 21, 1936 (R. 39). It orders that

certain tariff schedules filed by appellants be cancelled for reasons set forth in the Report of the Department which accompanied the order (R. 30). In effect, the order seeks to abolish a so-called contract rate system for the intercoastal transportation of certain commodities from points on the Gulf of Mexico to points on the Pacific Coast.

III.

Dates of Decree and of Presentation of Application for Appeal.

The decree sought to be reviewed was entered on July 15, 1936, in the District Court of the United States for the District of Columbia (then the Supreme Court of the District of Columbia).

The petition for appeal is to be presented this 11th day of August, 1936.

IV.

The Nature and Significance of the Case, and the Jurisdiction of the Proceedings.

The appellants, as members of the Gulf Intercoastal Conference, almost continuously from 1927 to October 3, 1935, maintained the so-called contract rate system which is the subject of this proceeding. (The Conference comprising the appellants operates under an argeement approved by the United States Shipping Board Bureau under Sec. 15 of the shipping Act, 1916 (U. S. C., Tit. 46, Sec. 814; 39 Stat. 733).) This system was a natural outgrowth of the necessity for stability of service and for protection against tramp steamers—steamers which had no intention of furnishing a regular service but which, for one reason or another, happened to have available space and were seeking cargo at any rate which they might secure. In the face

of such a possibility, established carriers, who were seeking to provide a regular service and to develop a dependable merchant marine between the Gulf and the Pacific Coast, never knew when their prospective cargoes might be taken from them by a chance carrier whose only hope of securing the business was by cutting the rates of the established carriers.

Only by the assurance that the various shippers would patronize established lines which were giving regular service could those lines continue to give such service. The method which was found advisable for this purpose was the contract rate system whereby the shippers who would not cooperate in producing a stable service through the medium of an exclusive patronage contract paid a premium approved by the United States Shipping Board when they shipped by any one of the regular carriers (appellants), and whereby shippers who signed such contracts were not required to pay such a premium and who, by virtue of their promise to give all of their business, during the period of their contract, to the regular carriers, received an assurance of adequate transportation facilities and of stability of service and rates.

Appellants' tariff schedule which was to be effective on October 3, 1935, embraced this contract rate system in a rule. The Secretary of Commerce suspended the rule and ordered an investigation into the system. This was known as "Gulf Intercoastal Contract Rates", Docket No. 294. On January 21, 1936, the Secretary found that the system was not justified and was unlawful, and ordered the appellants to cancel their contract rate schedules on or before February 3, 1936. The effective date was thereafter postponed to permit a judicial determination of the question. These proceedings were thereupon instituted in what was then the Supreme Court of the District of Columbia to set aside, annul, and enjoin the enforcement of, the said order,

in accordance with Sections 24, 208, and 209 of the Judicial Code (U. S. C., Tit. 28, Secs. 41 (28), 46, and 45).

Pursuant to the provisions of the District Court Jurisdiction Act (October 22, 1913, c. 32, U. S. C., Tit. 28, Sec. 47, 38 Stat. 220), there was convened a specially constituted District Court of the United States for the purpose of hearing the cause. By arrangement between the parties, the necessity for seeking an interlocutory injunction was obviated, and the only proceeding was in connection with the petition for a permanent injunction.

If the relief for which appellants pray be not granted, and if the order abolishing the contract rate system be allowed to stand, it would remove the basis of the dependable merchant marine which today plies between the Gulf and the Pacific, and would almost certainly return the chaotic conditions explained in the Bill of Complaint, which the Gulf Intercoastal Conference and the contract rate system were instrumental in remedying, all of which would tend to defeat the very purpose of the Shipping Act, 1916.

There is also involved in this proceeding the question of whether or not the Secretary of Commerce had the authority to issue any order whatsoever in the premises. By Executive Order No. 6166, promulgated June 10, 1933, effective August 10, 1933, the United States Shipping Board was abolished and its functions transferred to the Department of Commerce (U. S. C., Tit. 5, Sec. 132 (12)), where it became known as the United States Shipping Board Bureau. The said Executive Order was presumed to be authorized by the so-called Economy Act of June 30, 1932 (47 Stat. 413), and amended March 3, 1933 (47 Stat. 1518), (U. S. C., Tit. 5, Sec. 126). If this be true, the said Act constitutes a delegation of power in violation of Article 1, Section 1, and Section 8, Clause 18, of the Federal Con-

stitution. See *Schecter* v. *United States,* 295 U. S. 495; also *Humphrey* v. *U. S.,* 295 U. S. 602; *Panama Refining Company* v. *Ryan,* 293 U. S. 388. This same question is involved, exclusively, in the case of *Isbrandtsen-Moller Co., Inc.,* v. *United States,* (No. 307, October Term, 1936) wherein an appeal has already been allowed to the Supreme Court of the United States. In fact, this Court has entered an order preventing the accumulation of the penalty applicable in that case pending determination upon appeal here.

V.

Cases Believed to Support the Jurisdiction.

There have apparently been no cases decided by this Court involving the specific matter of jurisdiction here presented. However, the procedure for the review of orders of the Interstate Commerce Commission is identical with that for the review of orders of the United States Shipping Board, and, according to such procedure, appeals from decisions of statutory courts of three judges reviewing Interstate Commerce Commission orders have often been heard by the Supreme Court of the United States. Cases in point include *United States* v. *Illinois Central Railway,* 263 U. S. 515, and *Baltimore & Ohio Railroad Co.* v. *United States* (Chicago Junction case), 264 U. S. 258. These and many others are believed to support the jurisdiction of this Court in the case at bar.

VI.

Opinion Below.

The District Court of the United States for the District of Columbia rendered an opinion in this case on June 30,

1936, and a copy thereof is appended to this Statement as Exhibit "A".

Respectfully submitted,

ELISHA HANSON,
ELIOT C. LOVETT,
FRANK LYON,
Counsel for Appellants.

EXHIBIT "A".

Filed June 29, 1936.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, SITTING AS A UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

In Equity. No. 60,850.

SWAYNE & HOYT, LTD. (Gulf Pacific Line), a Corporation, 620 Matson Building, San Francisco, California; GULF PACIFIC MAIL LINE, LTD., a Corporation, 620 Matson Building, San Francisco, California; LUCKENBACH GULF STEAMSHIP COMPANY, INC., a Corporation, 120 Wall Street, New York City, *Plaintiffs,*

v.

UNITED STATES OF AMERICA, *Defendant.*

Elisha Hanson, Eliot C. Lovett, and Frank Lyon, all of Washington, D. C., for plaintiffs.

Leslie C. Garnett, United States Attorney, H. L. Underwood, Assistant United States Attorney, and R. H. Hallett, Assistant Counsel, U. S. Shipping Board Bureau, all of Washington, D. C., for defendant.

Before Groner, Judge, United States Court of Appeals, and Wheat, C. J., and Proctor, J., Supreme Court of the District of Columbia.

Per CURIAM:

This is an equity suit brought by plaintiffs to set aside an order of the Secretary of Commerce requiring plaintiffs (who compose the Gulf Intercoastal Conference) to cease and desist the practice of entering with shippers into certain rate contracts.

The order complained of restrained plaintiffs from charging two separate rates for the same service: one, the higher, charged against those shippers who refused to sign contracts agreeing to use plaintiffs' facilities exclusively; the other, a lower, charged against those shippers who enter into such contracts. The hearing was by a court constituted in accordance with the provisions of Sec. 47 of Title 28,

U. S. C. A. (see also Act Sept. 7, 1916, ch. 451, sec. 31, 39 Stat. 738).

Up to 1916 there was—speaking generally—no regulation by Congress of the rate structure and other practices of common carriers engaged in intercoastal transportation. In 1916 Congress passed the Shipping Act (39 Stat. 733, 46 U. S. C., 812). The Act applies somewhat differently to carriers by water engaged in foreign commerce and those engaged in intercoastal commerce. As to the latter Congress required that schedules of reasonable rates, fares, etc., should be filed with the Shipping Board and observed by the carriers. The Act forbade carriers' charging anything in excess of the maximum except with the approval of the Board; forbade rebates, discrimination, or unfair methods against a shipper patronizing another carrier. Section 16 provides that:

> It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—
>
> First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. * * *

In 1933 Congress enlarged the powers of the Shipping Board (47 Stat. 1425, 46 U. S. C. 844). The new Act required every carrier to file with the Shipping Board and keep open to the public its actual schedule of rates, fares, etc.; and forbade any change in the rates, fares, etc., except by publishing and filing a new schedule not effective, without the approval of the Board, earlier than thirty days after filing; and gave the Board power to suspend the effectiveness of the new schedule pending a hearing. Under the 1916 Act carriers were required to file only their maximum rate. Under the 1933 Act they are required to file

their actual rate, and the actual rate so filed may not be changed without giving thirty days' notice.

On June 10, 1933, the President issued an executive order numbered 6166, pursuant to the Executive Department Reorganization Act of June 30, 1932, as amended March 3, 1933 (47 Stat. 1517), whereby he abolished as of August 10, 1933, the United States Shipping Board and transferred its functions to the Department of Commerce. Ever since, the functions of the Shipping Board have been administered by the Department of Commerce under the direction of the Secretary.

In February, 1934, the Secretary instituted an investigation into the practices of intercoastal carriers, including the practice of extending preferential rates to shippers who agreed to use the carrier's facilities exclusively. This original proceeding was designated Docket No. 126. As a result of the hearings, an order was entered July 3, 1935, requiring the Gulf Conference on or before October 3, 1935, to discontinue the use of the contract rate system as embodied in the tariff on file. This order was vacated September 16, 1935, and a new hearing held, known as Docket No. 294. On January 21, 1936, the Department issued its report of the investigation, and the Secretary issued his order requiring the Gulf Conference to cancel the contract rates as contained in its tariff. The findings of the Secretary were:

> 1. "It is clear that the real purpose of the suspended rates and rule is to prevent shippers from using the lines of other carriers and to discourage all others from attempting to engage in intercoastal transportation from and to the Gulf."
>
> 2. "The department finds the contract rate system provided for in the schedules under suspension not justified by transportation conditions in the trade involved and unduly and unreasonably preferential and prejudicial in violation of section 16 of the Shipping Act, 1916."

The effective date of the order was continued to June 30, 1936, and it is the purpose of this suit to annul and set it aside, on the grounds that the findings of the Department

and the order of the Secretary are contrary to the evidence and contrary to the law applicable to the situation.

The question of the lawfulness of the order, and the further question whether the transfer of the functions and authority of the Shipping Board to the Shipping Board Bureau of the Department of Commerce is legal and valid, are the two questions for decision.

Briefly, the contract rate system works as follows: The Conference selects a number of items as to which it establishes a contract rate. These items are usually those heavy commodities which move regularly in large quantities. Shippers of these commodities may execute a contract and thus avail themselves of the advantages of a lower rate that during the period of the contract may not be increased. The shipper—as his part of the agreement—promises to ship by vessels of the Conference lines all water-borne shipments which he makes from any Gulf port to the west coast during the term of the contract. The agreement does not prevent the shipper from transporting by rail to the west coast or from shipping out of north Atlantic or south Atlantic ports. It does require him, however, if he ships from the Gulf to the west coast to use one of the Conference lines, and paragraph 4 of the contract provides that if the shipper violates this agreement, the whole contract shall terminate and the shipper shall be liable for the non-contract rate on all shipments made during the term of the contract. The contracts are executed for a term of six months.

The non-contract rate is the rate fixed for items covered by the contract rate when those items are shipped by a person who has not executed a contract with the conference. It is 10 cents per hundred pounds or $2.00 per ton higher than the contract rate, and this figure is arbitrarily fixed. There is no difference in the service offered or rendered to a contract and a non-contract shipper. As explained by the Chairman of the Conference, a non-contract shipper pays 10 cents per hundred pounds for the privilege of holding off to patronize any cut-rate line that may come along. The witnesses for the Conference testified that approximately 64% of all port-to-port tonnage carried by plaintiffs (west bound) moved under contract rates, and that of this

64%, more than 99% moved under contracts. The contract rate applies only to west bound port-to-port shipments and does not apply to combination rail or barge shipments.

In justification of the contract system, the plaintiffs point out the disastrous results of rate wars in the past, the stability of rates and service as the result of the system, the insufficiency of traffic from the Gulf to support another line, and the almost universal satisfaction and approval with which all shippers regard the system.

The Department, on the other hand, insists the effect of the system is to create a monopoly in favor of the Conference lines to the exclusion of any other lines which might wish to enter the Gulf intercoastal trade; is also to force shippers to tie themselves up for a period of six months and lose the opportunity of using other lines which might offer cheaper service; and, finally, to require those who do not tie themselves up to pay an unjust and discriminatory rate.

There is much to be said, from a practical standpoint, in favor of the Conference system, for there is no dispute that the Gulf trade has suffered by rate-cutting wars and equally, as we think, no dispute that the system tends to stabilize conditions. The evidence likewise supports the position that the available traffic from Gulf ports will not support another line and that the invasion of the territory by an outsider would necessarily result in rate wars and some demoralization of shipping. In all these respects it commends itself to those immediately concerned. It is not, therefore, surprising that the great bulk of the patrons of the Conference lines express approval of the system. The stability of rates and of service enables them to quote prices for future deliveries, with the assurance that for several months, at least, there will be no increase in freight charges. While saying this much, however, these shippers realize, as of course is obvious, that the purpose and effect of the contract system is to force traffic to the Gulf Conference lines and to that extent to create a monopoly so far as shipment from Gulf ports is concerned.

Notwithstanding this latter condition, the great majority of shippers, as we have seen, assert the desirability of the system because of reliability of service and reasonableness of rate. To obtain these they are willing to forego the opportunities of cheaper rates from an occasional intruder or cheaper rates with demoralization of service incident to a rate war. Plaintiffs assert that there is nothing in the system to prevent other lines, if they desire, from applying for membership in the Conference and enjoying the benefits of the system. But, in spite of this, the fact is that if a shipper wants to hold himself free to get a lower rate from casual non-established carriers, he must pay $2.00 a ton more than the shipper who agrees to use the Conference lines exclusively; and freedom of operation in the Gulf is more theoretical than practical, for if the business offered is only enough to load one vessel each week, as seems to be conceded, it would be business folly for others regularly to enter the field.

Without deciding, therefore, to what extent we are bound by the finding of the Secretary that the practice is discriminatory and violates the provisions of Section 16 of the Act, we are of opinion that the admitted and undisputed facts bring the practice within the condemnation of the statute. The Act makes it unlawful for the carrier to give any undue or unreasonable preference or advantage to any particular person or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. The contract in question unquestionably confers a preference on the shippers who accept it. Through it they obtain a rate of $2.00 per ton less than the rate charged other shippers for the same commodities for the same service in the same ships. There can be no dispute on that subject. But, admitting this, plaintiffs say that the preference must be undue or unreasonable and point to the language of the statute in support of their position. They insist that the preference to their contract shippers is not unreasonable, is offered to all alike, and is reciprocally beneficial—beneficial to the carrier because it insures it a constant flow of remunerative business and beneficial to the shipper be-

cause it insures him stability of rate and regularity of service. And all of this may be true. But the unreasonableness of the contract is in the fact that it insures to one shipper who is willing to tie himself up by contract the same service at a cheaper rate than the carrier is willing to extend to another shipper who is not, and thus is effective to coerce all shippers to abandon the advantages of competition or pay a penalty. It is likewise subject to condemnation for this reason.—The rate charged the contract shippers obviously is, from the carrier's point of view, a remunerative rate. This being true, the exaction of a higher rate by 10¢ per cwt. from all other shippers is an undue and unreasonable exaction. It is in effect a penalty.

Not only is this true, but the contract is likewise prejudicial to the "locality", i. e., the Gulf territory, because the tendency is to exclude all competition and create a monopoly in favor of the Conference carriers. The effect of the monopoly is to destroy the checks and balances imposed by free and unrestrained competition; and we can not doubt that, in forbidding any water carrier from subjecting any locality to unreasonable prejudice or disadvantage, Congress intended to include any act the tendency of which would be to destroy the restraints which competition imposes.

Here the result of the contract system is a complete, effective, and perpetual bar restraining all other carriers from attempting to serve the public as carriers between Gulf ports and the west coast. Such an imposed monopoly was unreasonable discrimination at common law.—Menacho *v.* Ward, 27 Fed. 529. It is no less so, under the provisions of the federal statute. In saying this we are by no means unmindful of the problems of the American shipowner. That these problems are pressing to the point of emergency, is obvious to those who have watched the steady decline of American shipping since the period of the World War; and that the problem requires special treatment from Congress is, we believe, universally admitted. The increase and maintenance of the American merchant marine is a subject of national concern, indeed of national safety, but the remedy is political and not judicial.

Second. The transfer of the former functions of the United States Shipping Board by executive order to the Department of Commerce was, in our opinion, in all respects legal and effective to confer on the Secretary all the regulatory powers of the statute. The question is not new. Precisely the same point was urged in Isbrandtsen-Moller Company, Inc., *v.* United States, et al., 14 F. Supp. 407; and the opinion of Judge Chase so fully and, as we think, satisfactorily answers it that nothing more need be said, except to refer to that case and adopt its reasoning, which we do.

In view of what is said above, it follows that the bill in this case should be, and it is dismissed.

Dismissed.

(8348-C)

FILED
JAN 22 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 494

SWAYNE & HOYT, LTD. (Gulf Pacific Line), GULF PACIFIC MAIL LINE, LTD., and LUCKENBACH GULF STEAMSHIP COMPANY, INC., *Appellants*,

vs.

THE UNITED STATES OF AMERICA.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

ELISHA HANSON,
ELIOT C. LOVETT,
729 Fifteenth Street,
Washington, D. C.,
FRANK LYON,
Shoreham Building,
Washington, D. C.,
Attorneys for Appellants.

Eynon Printing Co., Inc., Washington, D. C.

TABLE OF CONTENTS

	Page
I. Opinion Below	1
II. Jurisdiction	1
III. Statement of the Case	2
IV. Question Presented	12
V. Specification of Errors	12
VI. Summary of Argument	13
VII. Argument	14
Point 1. The Order of the Secretary of Commerce is Unsupported by the Evidence	14
Point 2. The Order is Contrary to the Evidence and to the Purpose of the Shipping Act	16
Point 3. The Contract Rate System is Lawful: (*a*) The Contract Rate System is in Accord with the Rule of the Supreme Court of the United States	19
(*b*) The Principle of the Contract Rate System has been Approved by the United States Shipping Board Bureau	22
Point 4. The Secretary of Commerce was without Authority to issue the Order in Question	25
VIII. Conclusion	27

AUTHORITIES

Cases:	Page
Baltimore & Ohio Railroad Company v. *United States*, 264 U. S. 258	25
Chicago, Rock Island & Pacific Railway Co. v. *United States*, 274 U. S. 29	15

Davis v. *Portland Seed Co.*, 264 U. S. 403 15
Girdwood Shipping Company, Schedules of, 1 U. S. S. B. B. 306 9
Humphrey's Executor v. *United States*, 295 U. S. 602 26
Interstate Commerce Commission v. *Baltimore & Ohio Railroad Company*, 145 U. S. 263 20
Interstate Commerce Commission v. *Louisville & Nashville Railroad*, 227 U. S. 88 15
Isbrandtsen-Moller Co., Inc. v. *United States*, 14 F. Supp. 407 26
Louisville & Nashville Railroad Co. v. *Dickerson*, 191 Fed. 705 15
Merchants Warehouse Co. v. *United States*, 283 U. S. 510 15
Pennsylvania Railroad Co. v. *International Coal Mining Co.*, 230 U. S. 184 15
United States v. *Abilene & Southern Railway Co.*, 265 U. S. 274 15
United States v. *Illinois Central Railway*, 263 U. S. 515 ..... 19, 25
W. T. Rawleigh Company v. *Stoomvaart, et al.*, 1 U. S. S. B. B. 285 22

Miscellaneous:
District Court Jurisdiction Act 2
Executive Department Reorganization Act (Economy Act) 11, 26
Executive Order No. 6166 ..... 11, 25, 26, 27
Intercoastal Shipping Act, 1933 9
Interstate Commerce Act:
Section 3 20
Shipping Act, 1916 18
Section 15 ..... 2, 17, 22
Section 16 ..... 14, 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 494

SWAYNE & HOYT, LTD. (Gulf Pacific Line), GULF PACIFIC MAIL LINE, LTD., and LUCKENBACH GULF STEAMSHIP COMPANY, INC., *Appellants,*

vs.

THE UNITED STATES OF AMERICA.

BRIEF FOR APPELLANTS

I.

Opinion Below

The opinion of the District Court of the United States for the District of Columbia was filed on June 29, 1936. (Record, pages 35-42.) It has not been reported.

II.

Jurisdiction

A statement as to the jurisdiction of the Supreme Court of the United States was duly filed pursuant to Rule 12 and, on November 23, 1936, probable jurisdiction was noted by the Court.

III.

Statement of the Case

This is a proceeding to review and set aside an order (R. 34) of the Secretary of Commerce seeking to abolish a certain contract rate system which for many years previously had been employed by appellants in their shipping business. A hearing was held on April 6 and 7, 1936, before a special statutory court of three judges constituted for that purpose in accordance with the provisions of the District Court Jurisdiction Act (U.S.C., Title 28, §47) and of the Shipping Act, 1916 (U.S.C., Title 46, §830). That court entered its decree (R. 47) on July 15, 1936, dismissing the bill of complaint.

The appellants are common carriers by water engaged in intercoastal commerce between United States ports on the Gulf of Mexico and ports on the Pacific Coast via the Panama Canal. They constitute the membership of the Gulf Intercoastal Conference and operate under an agreement (R. 80) which has been duly approved by the United States Shipping Board Bureau, Department of Commerce, pursuant to the provisions of Section 15 of the Shipping Act, 1916 (39 Stat. 733, U.S.C., Title 46, §814).*

---

* Section 15 of the Shipping Act, 1916, provides:

"That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; alloting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

"The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in

As members of the Gulf Intercoastal Conference, the appellants, almost continuously from October, 1927, to October, 1935, maintained the contract rate system here involved. (R. 61, 63-64.) For several years after the first shipping service was commenced from the Gulf to the Pacific via the Panama Canal the trade was disrupted by rate-cutting practices and resultant rate wars which not only seriously affected the revenues of the steamship lines but also brought about very unstable conditions for shippers, who could not determine in advance what their own or their competitors' freight rates would be. At the request of various shippers, and after serious consideration by the water carriers as to what should be done to effect a stabilized condition as to service and rates, the contract rate system was inaugurated. (R. 20-21, 31, 61, 76.) The first appearance of contract rates was in connection with Westbound Contract List No. 1 issued at Gulfport, Mississippi, in October, 1927. (R. 63-64.) The system remained in effect until October, 1935, except for a short period from July, 1928, to February, 1929, when the Gulf Conference was disbanded. The operation of the system proved a very material factor in stabilizing conditions both as to service and rates. (R. 61.) During a very disastrous rate war

---

violation of this Act, and shall approve all other agreements, modifications, or cancellations.

"Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

"All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

"Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act approved July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' and amendments and acts supplementary thereto.

"Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

which took place in the North Atlantic service during 1931 and resulted in extremely chaotic conditions, the Gulf Conference remained intact and generally upheld the Gulf rate structure. Without the contract system there is a great possibility that the Conference lines would find themselves unable to continue to render the same service, thus resulting in materially reduced operations. (R. 64.)

The form of contract (R. 77-80) employed is merely an agreement between the appellants, as members of the Gulf Intercoastal Conference, and the shipper whereby the latter, during the term of the contract (usually six months, all contracts expiring at the same time) agrees to ship by steamers of the Conference lines all of the water-borne shipments which the shipper shall make *of the commodity indicated* from Gulf ports to Pacific Coast ports, such shipments being *estimated at a given number of carloads.* The carriers agree to transport all of the said shipments, provided space is available when application is made therefor, at the rates named in the contract as modified by the tariff which is filed with the Shipping Board Bureau and is subject to approval, disapproval, and regulation by the Bureau. *The tonnage estimates given in the contracts enable the carriers to arrange their operations accordingly* (R. 67). It is provided that, if the shipper shall violate the agreement, the higher rate set forth in the tariff shall be payable upon all shipments made within the contract period. A differential of ten cents per hundred between the contract and non-contract rate was determined by the appellants to be equitable and is the one applied (R. 65).

Contract rates do not apply to all commodities, but, in general, apply only to those which move in large volume and with regularity. (R. 64.) However, there are some articles, such as bulk sulphur, bulk corn, soil pipe, agricultural implements, and hardwood lumber, that move in heavy volume but are not contractable. (R. 75.) Corn was at one time on the contract list, but it was removed at the request of shippers of that commodity. (R. 64.) The Conference members select the commodities which are to be contract-

able, but often shippers request that certain commodities be placed upon the contract list. (R. 64.) The change of a commodity from non-contractable to contractable does not necessarily mean a ten-cent reduction. If the item be made contractable, the rate then applicable may become the contract rate, in which case the non-contract rate would be ten cents higher. (R. 67.) The tariff filed by appellants to become effective October 3, 1935, contained 1137 items, and *only 382 of these were contractable.* (R. 56.)

The contract system does not apply at all to eastbound traffic, but only westbound—from the Gulf to the Pacific. This is because conditions in the trade are such that contracts are not needed to stabilize the service and the rates eastbound. (R. 62.) The system likewise applies only on traffic moving port-to-port, although some of the traffic from the Gulf moves under joint all-water rates with the barge lines, some under rail-ocean rates with the railroads, and some under rail-barge-ocean rates, in addition to port-to-port movements (R. 74). From January 1 to July 1, 1935, 63.7% of all tonnage carried by appellants westbound moved under contract. During this same period less than 1% of the contractable tonnage moved at non-contract rates. (R. 60.)

The contract system only places a deterrent upon shipments via steamers that do not operate regularly in the Gulf intercoastal trade and have no interest therein except for such revenue as they may obtain from it. This is done, as above indicated, by providing that the Conference lines shall charge a contract shipper the higher (non-contract) rate upon his contract commodities if he has violated his contract and shipped items named therein by other lines westbound from Gulf ports.

Contracts are available to *all* shippers who care to sign. (R. 65, 67.) A shipper has the privilege of executing a contract on only one contractable item or on as many in the tariff as he sees fit. (R. 62.) It is entirely up to the *shipper* to decide whether he will pay a non-contract rate or a contract rate.

The contract shipper has the choice of all lines in t
Gulf Conference. (R. 57.) At the present time those lin
are three in number, being the appellants herein. Sway
& Hoyt, Ltd., operate the Gulf Pacific Line and manage t
Gulf Pacific Mail Line, Ltd. The latter comes into the Gu
eastbound on its own behalf and then its vessels serve t
out-ports of the Gulf westbound for the Gulf Pacific Line
that the westbound service is, with slight exception, serv
by only two lines, namely, Luckenbach Gulf Steamship Co
pany and the Gulf Pacific Line. (R. 63.)

There are no carriers operating regularly in the gener
cargo trade from the Gulf to the Pacific that are not me
bers of the Gulf Intercoastal Conference. The Conference
limited to lines engaged in the Gulf intercoastal trade, b
any such line may become a member of the Conferen
(See Par. 6* of Conference Agreement, R. 83.) The matt
of ultimate inclusion in or exclusion from the Conference
one of detailed regulation by the Bureau.

In this connection it must be remembered that any oth
group of water carriers may, if it sees fit, establish a co
ference in the Gulf entirely apart from the Gulf Intercoast
Conference. The only limitations are those imposed
Section 15 of the Shipping Act, and by regulations of t
Secretary of Commerce. In other words, the way is op
to all to enter into a cooperative arrangement by agreeme
approved by the Secretary just as it was to the appellan
herein. Obviously, the majority of the tonnage moves ov
appellants' lines, inasmuch as they offer the only regul
service between the Gulf and the Pacific, and more th
one-half of this tonnage moves under contract. Howeve
it should be noted that of 1137 items in the westbou

---

* Par. 6 provides that "Any person, firm or corporation engaged in sa
intercoastal trade may hereafter become a party to this agreement by t
consent of a majority of the parties hereto by affixing his, their or its sig
ture hereto. Such admission for membership in this Conference,
official application, shall not be denied to any party except for just a
reasonable cause; further, no such admission to membership is to
effected until modification recording same has been filed with and approv
by the United States Department of Commerce. . . ." (R. 83.)

tariffs filed by appellants, only 382, or approximately one-third of the total, are contract items. None of the others are subject to contract rates, and they are in the same position as though there were no Gulf Intercoastal Conference Agreement or contract rate system.

Any steamship company that knows intercoastal trade can enter the Gulf service if it cares to do so, but it would not be easy to operate successfully because the service is now adequately tonnaged. (R. 65.) As a matter of fact, the Gulf Pacific Line, at the time of the hearing, was operating only six steamers in the Gulf intercoastal trade, and the Gulf Pacific Mail Line, Ltd., was operating three. Those lines had had three or four steamers tied up for the preceding two or three years and were anxious to take at least one of them back to the Pacific Coast, but had been unable to secure sufficient excess cargo for that purpose. Luckenbach Gulf Steamship Company was then operating six steamers in that trade. (R. 74.)

The contract rate system would be only a minor obstacle to the successful operation of a new line in the Gulf intercoastal trade. However, the additional line would take enough tonnage from the present Conference members to make the result felt very seriously in their revenues, probably to the extent of reducing their services. If such a line offered a service comparable to that of the Conference lines, and at lower rates, the new line would have very little difficulty in keeping its ships filled in both directions, but it is questionable as to whether or not it could operate successfully at such rates. This is because the bulk of the cargo moving through the Gulf is low grade and can only support a low level of rates. (R. 65-66.) In fact, a witness who opposed the contract rate system would not state that successful operation would be possible by another line from the Gulf *even though there were no contract rate system*, and he admitted that it would not be in the public interest to have five or six lines operating from the Gulf to the Pacific. (R. 68.) The lower court observed in its opinion

that *"the available traffic from Gulf ports will not support another line."* (R. 39).

Only one other line, namely, the Nelson Steamship Company, has sought membership in the Gulf Intercoastal Conference. That Company first applied for membership in March, 1934, but its application was denied. At that time it had filed no tariffs and had no service in effect in the Gulf. (R. 68, 69.) Obviously, it was not engaged in the intercoastal trade as required by the Conference Agreement. Two months later it again applied and was again denied. It then filed a petition with the Shipping Board Bureau asking that the approval of the Conference Agreement be withdrawn. The petition was denied. (R. 68-69.) The Company had a fleet of 12 vessels, only six or seven of which were being operated. (R. 69-70.) According to its Vice President, the Company would have used a number of its idle steamers in the Gulf trade if it had not been for the contract rate system. (R. 68.) It even considered the possibility of entering the Gulf at the expiration of appellants' existing contracts, but decided that it would have only a "50-50 chance" of success. (R. 69.) It anticipated that there would be a marked development of business for the Pacific Coast by the way of the Gulf and it wanted to be in a position to participate in that business when it developed. The Company also expected to develop new business by taking tonnage away from the North Atlantic lines. (R. 69.)

The practical issue in connection with the contract rate system is between a regular service with stabilized rates and a service which is subject to frequent interruption by reason of the entry of one-way tramp steamers or distress* tonnage of one kind or another. Distress tonnage represents an actual danger that has confronted the Conference lines since the enactment of the Intercoastal

---

*An example of "distress tonnage" is where an owner charters a ship eastbound from the Pacific Coast to some one, who does not operate regularly, to carry a full cargo into the Gulf, and the owner or charterer is willing to take any cargo for the return trip that he can secure *at cut rates* (R. 66).

Shipping Act, 1933.* (R. 66-67.) An illustration is the so-called Girdwood case where three steamers, two of them idle vessels chartered by the Nelson Company to Girdwood, were allowed to load and sail after the Girdwood Company had temporarily filed a tariff with the Bureau materially reducing the rates from the Gulf to the Pacific. The Company owned no steamers, had no soliciting forces to speak of, and, in fact, had nothing except a sub-charter of the vessels. (R. 67, 69.) Thereafter, regular tariff schedules from the Gulf to the Pacific were filed but were protested. Pursuant to a hearing, wherein it appeared that Girdwood owned no vessels and had none under charter, and did not own, control or lease any terminal facilities, the Secretary of Commerce found that the Company was not a common carrier by water and so ordered the tariffs stricken from the files. See *Schedules of Girdwood Shipping Company*, 1 U. S. S. B. B. 306, decided March 15, 1934.

During the eight years that the contract rate system has been employed by appellants there has never been a formal complaint against the practice. (R. 62.) On the contrary, the record shows that the shippers overwhelmingly approve the system. In fact, this is admitted by the appellee in Exhibit B attached to its answer (R. 31):

> "The record shows that generally shippers who heretofore have executed rate contracts with respondents are satisfied with the contract rate system and urge its continuance. Only one of such shippers, and representatives of Sudden & Christenson (Arrow Line)

* The appellee has always insisted that any need which may have previously existed for the contract rate system was eliminated by the Intercoastal Shipping Act, 1933 (47 Stat. 1425, U.S.C., Title 46, § 844), which enlarged the powers of the Shipping Board. As observed in the opinion of the lower court (R. 36-37): "The new Act required every carrier to file with the Shipping Board and keep open to the public its actual schedule of rates, fares, etc.; and forbade any change in the rates, fares, etc., except by publishing and filing a new schedule not effective, without the approval of the Board, earlier than thirty days after filing; and gave the Board power to suspend the effectiveness of the new schedule pending a hearing. Under the 1916 Act carriers were required to file only their maximum rate. Under the 1933 Act they are required to file their actual rate, and the actual rate so filed may not be changed without giving thirty days' notice."

and Nelson Steamship Company, common carriers by water engaged in intercoastal transportation between Atlantic and Pacific coasts, testified against the proposed rates and rule."

The objecting shipper to whom reference is made had formerly held a contract with appellants but had failed to renew it and so was called upon, pursuant to an affirmative ruling by the Shipping Board, to pay the non-contract rate. He subsequently entered into contracts with appellants. He opposed the system not because contract shippers did not receive any special physical service, but because he found it "annoying and troublesome, as well as unnecessary." Furthermore, he was not particularly interested in regularity of service—one of the two aims of the contract system. (R. 60.)

There were introduced in evidence 218 letters from as many different shippers, 215 of which advocated the continuance of the contract rate system and three of which advocated its discontinuance. (R. 71.) More than 37% of the contractable tonnage handled by the appellants was furnished by 191 of the shippers who wrote in favor of the system. (R. 62.) If there were to be added to that the contractable tonnage furnished by the United States Pipe & Foundry Company and the American Cast Iron Pipe Company, each of which advocated (R. 56, 57) the continuance of the system, the total would represent 55.4% of the contractable tonnage. (R. 62.) Excerpts from several of the letters are set forth in the record. (R. 71-73.) Two of the three shippers who wrote in opposition to the retention of the contract system furnish only very small amounts of cargo from the Gulf, and the third was from the aforementioned shipper who had violated his contract and appeared personally to testify against the appellants. (R. 62.)

Several shippers testified that the contract rate system had been satisfactory because it guaranteed them against increases in rates on comparatively long term contracts,

and that this stability of rates afforded by the contract system was necessary especially where prices must be supplied months in advance, and where bids must be submitted weeks before the business actually materializes. (R. 56-57, 58-59, 61.) One witness testified that his company, a large shipper (approximately 120,000 tons annually) of cast iron pipe from the Alabama manufacturing territory, had had experience with all types of steamship service, both tramps and regular lines; that the service and rates never became well established until 1924 or 1925, when two reliable lines entered the Gulf intercoastal service, signed contracts with the company and protected it with a maximum rate; that this practice grew into the contract rate system; and that it has proved entirely satisfactory, and a protection which his company does not want to see eliminated. (R. 75-76.)

On June 10, 1933, the President issued an executive order numbered 6166 (U.S.C., Title 5, § 132, note), presumed to be pursuant to the Executive Department Reorganization Act of June 30, 1932, as amended March 3, 1933 (47 Stat. 1517, U.S.C., Title 5, §126), whereby he abolished, as of August 10, 1933, the United States Shipping Board and transferred its functions to the Department of Commerce. Ever since, the functions of the Shipping Board have been administered by the Department of Commerce under the direction of the Secretary.

The tariff schedule which was filed by appellants to be effective on October 3, 1935, embraced the contract rate system in a rule (#53, R. 53) providing that shippers who did not sign contracts would be charged ten cents more per hundred pounds than the contract rates. The Secretary of Commerce suspended the rule and ordered an investigation into the question of the contract system. This was known as Docket No. 294 and was the second investigation embracing this subject, the first being Docket No. 126—"Intercoastal Investigation, 1935," that resulted in an order abolishing the system, which order was later vacated. Pursuant

to the second investigation the Secretary entered an order (R. 34) on January 21, 1936, commanding appellants to cancel their contract rate schedules on or before February 3, 1936. The effective date was thereafter postponed several times, finally to June 1, 1937, to permit a judicial determination of the question.

This suit was filed on March 4, 1936, praying (R. 9) that the order of the Secretary be adjudged unlawful and void, and that it be "set aside, suspended, cancelled and rescinded, and the enforcement thereof perpetually enjoined".

IV.

Question Presented

The primary question presented is whether appellants' contract rate system is unduly or unreasonably preferential or prejudicial by virtue of the fact that it offers to contracting shippers a lower rate covering certain commodities, when moving entirely port to port from the Gulf to the Pacific, in exchange for the agreement of such shippers to ship all such commodities, estimated in the contract as to total tonnage, during the period of the contract, in vessels operated by the water carriers regularly engaged in the Gulf intercoastal trade and operating under a Conference Agreement duly approved by the Secretary of Commerce, where it is shown (1) that such patronage is necessary in order to insure regularity and stability of service and to further the purpose of the Shipping Act, and (2) that there is not sufficient tonnage available to support an additional water carrier.

V.

Specification of Errors

The District Court of the United States for the District of Columbia erred—

1. In refusing the injunction prayed for and in dismissing the Bill of Complaint.

2. In finding that the order appealed from is supported by substantial evidence and is lawful and valid.

3. In finding that the contract rate system results in any undue or unreasonable preference or advantage.

4. In finding that the contract rate system results in any undue or unreasonable prejudice or disadvantage.

5. In finding that the charging of a higher rate under the contract rate system is, in effect, a penalty.

6. In finding that the contract rate system creates a monopoly in favor of the Conference carriers.

7. In finding that the contract rate system results in unreasonable discrimination.

8. In finding that the transfer of the former functions of the United States Shipping Board by Executive Order to the Department of Commerce was legal and effective to confer on the Secretary of Commerce all the regulatory powers of the Shipping Act, as amended.

VI.

Summary of Argument

Point 1. The order of the Secretary of Commerce is unsupported by the evidence.

Point 2. The order is contrary to the evidence and to the purpose of the Shipping Act.

Point 3. The contract rate system is lawful.

(a) The contract rate system is in accord with the rule of the Supreme Court of the United States.

(b) The principle of the contract rate system has been approved by the United States Shipping Board Bureau.

Point 4. The Secretary of Commerce was without authority to issue the order in question.

VII.

Argument

The opinion and findings of fact of the lower court are in substantial accord with the facts appearing above. The court recognized the gravity of the situation which confronts appellants, and which the contract rate system was adopted to alleviate, when it stated (R. 41):

> ". . . we are by no means unmindful of the problems of the American shipowner. That these problems are pressing to the point of emergency, is obvious to those who have watched the steady decline of American shipping since the period of the World War; and that the problem requires special treatment from Congress is, we believe, universally admitted. The increase and maintenance of the American merchant marine is a subject of national concern, indeed of national safety, but *the remedy is political and not judicial.*" (Emphasis supplied.)

While they are appreciative of this sympathetic attitude of the lower court, the appellants contend that, pending such political remedies as may be provided, the contract rate system should be permitted to continue to assist them in solving their problems and those of Gulf intercoastal shippers for the following reasons:

Point 1. The Order of the Secretary of Commerce is Unsupported by the Evidence

The Secretary of Commerce found, and was affirmed by the lower court, that the contract rate practice of the appellants is discriminatory and in violation of that part of Section 16 (39 Stat. 734, U. S. C. Title 46, sec. 815) of the Shipping Act, 1916, which makes it unlawful for any common carrier by water—

> "To make or give any undue or unreasonable preference or advantage to any particular person, locality,

or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Aside from the mere finding of the Secretary there is nothing in the record to show discrimination of any kind whatsoever against shippers, carriers or ports. This fact appears to be recognized by the lower court, but that court proceeded to express the opinion (R. 40) that the "admitted and undisputed facts bring the practice within the condemnation of the statute". Inasmuch as it is impossible to find any *evidence* in the record to show that the practice of the appellants resulted in any undue discrimination, the opinion of the court, as well as the finding of the Secretary, is apparently based upon the *assumption* that the operation of the contract rate system represents a potential violation of the statute.

When the tariffs of the appellants embodying the system of contract rates were placed on file by and with the Shipping Board those tariffs, together with the contract rate system which was a part thereof, had the force and effect of a statute. *Pennsylvania Railroad Co.* v. *International Coal Mining Co.*, 230 U. S. 184, 197, 57 L. ed. 1446, 1451; *Davis* v. *Portland Seed Co.*, 264 U. S. 403, 418, 68 L. ed. 762, 766; and *Louisville & Nashville Railroad Co.* v. *Dickerson*, 191 Fed. 705, 709. It is admitted that the mere fact that the contract system has been long continued and that the machinery for its operation is in tariff form "cannot clothe it with immunity." *Merchants Warehouse Co.* v. *United States*, 283 U. S. 510, 511, 75 L. ed. 1227, 1237. However, it is still necessary that there be *substantial evidence* to show that the practice results in undue or unreasonable preference or advantage. *Chicago, Rock Island & Pacific Railway Co.* v. *U. S.*, 274 U. S. 29, 33, 71 L. ed. 911, 915; *U. S.* v. *Abilene & Southern Railway Co.*, 265 U. S. 274, 288, 68 L. ed. 1016, 1022. As stated by this court in *Interstate Com-*

merce Commission v. *Louisville & Nashville Railroad*, 227 U. S. 88, 91, 57 L. ed. 431, 433:

> ". . . *A finding without evidence is arbitrary and baseless.* And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and *comes under the Constitution's condemnation of all arbitrary exercise of power.*" (Emphasis supplied.)

The finding of the Secretary and of the lower court, being without foundation in fact, is arbitrary and baseless and, therefore, cannot support the order in question.

Point 2. The Order is Contrary to the Evidence and to the Purpose of the Shipping Act

The record not only fails to disclose any undue preference or advantage under the contract rate system, but it affirmatively shows that there results therefrom no undue prejudice or disadvantage, or any discrimination whatsoever, against shippers, carriers or ports.

Any shipper who cared to do so could execute a contract. A non-contract shipper who thought that he was the victim of discrimination because he was being charged a non-contract rate could readily become entitled to the lower rate merely by signing a contract. The removal of the "discrimination" was therefore solely within the control of the shipper. The carrier could not compel him to sign a contract but could only continue to offer him the opportunity to sign; he could do so or not, just as he saw fit. And he could contract as to any number of contractable items he chose. Thereafter he could still ship, without violating his

contract, any items covered thereby either by rail, rail-ocean, rail-barge-ocean, or barge-ocean routes, or by intercoastal water lines operating from the Atlantic. In other words, he merely obligated himself, if he intended to ship any of his contract items through the Gulf, to patronize one of the regular, established services rather than such chance service as might be offered by tramp steamers. Certainly this does not constitute discrimination between shippers.

As far as carriers are concerned, it has already been shown that any carrier regularly engaged in the Gulf intercoastal trade is eligible for membership in the Gulf Intercoastal Conference, the announced purpose of which is "to promote commerce between United States Gulf and Pacific Coast ports" (R. 81). The Conference Agreement has been duly approved by the Bureau under Section 15 of the Shipping Act (U. S. C., Title 46, sec. 814) and all activities thereunder are under the jurisdiction of and subject to review by the Bureau. If the members of the Conference should refuse to admit a carrier for cause found by the Bureau to be insufficient the Bureau could withdraw its approval of the agreement. The continued combined activities of appellants would then be no longer excepted from the provisions of the anti-trust laws as provided in Section 15.*

If a carrier does not choose to join the Conference it can nonetheless engage in transportation by water between Gulf and Pacific Coast ports. Even though there be only a relatively small number of non-contract shippers who ship contractable commodities, yet there are a large number of non-contractable commodities the movement of which would be

---

*The fifth paragraph of Section 15 (46 USC § 814) provides that "Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act approved July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' and amendments and acts supplementary thereto."

open to *any* carrier. As a matter of fact, less than 64% of the tonnage carried by the Conference lines moved under contracts. This means that more than one-third of the port-to-port tonnage is open to any carrier, and it must always be remembered that the tonnage moving under joint all-water rates with the barge lines, or under rail-ocean rates with the railroads, or under rail-barge-ocean rates, are never covered by appellants' contracts. Certainly a carrier who prefers *not* to offer a *regular service* cannot be heard to complain because he finds it difficult to participate in *all* of the *regular port-to-port trade.*

Likewise, there has never been any discrimination between ports, nor has there been a case where a port has been eliminated from any benefits accruing from the contract rate system. In fact, according to the testimony of one witness, the contract rate system has been an advantage to the port of Mobile by virtually guaranteeing a flow of traffic through that port and a consequent continuation of the State docks (R. 57).

Further evidence of the *absence* of undue prejudice or disadvantage, or of discrimination of any kind, is found in the record, which shows that, with one minor exception, shippers who furnish tonnage to the appellants favor the contract rate system because it assures them a stable and regular service which makes for a degree of rate stability that protects them on comparatively long-term contracts. These facts are recognized by the lower court (R. 39). Certainly if the system were unreasonably or unduly prejudicial it would hardly have found the almost universal support which the record indicates it enjoys.

The Shipping Act, 1916, was specifically stated to be—

> "An Act to establish a United States Shipping Board for the purpose of *encouraging, developing, and creating* a naval auxiliary and naval reserve and *a merchant marine to meet the requirements of the commerce of the United States* with its Territories and possessions and with foreign countries; to regulate carriers by

water engaged in the foreign and interstate commerce of the United States; and for other purposes." (39 Stat. 728, c. 451. Emphasis supplied.)

The evidence herein shows that the contract rate system has tended to achieve this purpose because it has been conducive to the maintenance of an efficient and regular service between United States Gulf and Pacific Coast ports "to meet the requirements of the commerce of the United States." Without that system, according to the record, and as recognized by the lower court (R. 39), the appellants, the only regular carriers in this service, could not have developed and cannot now maintain the dependable merchant marine which is available today. It may be said, without fear of supported contradiction, that if the basis of the present merchant marine which plys between the Gulf and the Pacific be removed there will return the chaotic conditions which the Gulf Conference *and* the contract rate system were instrumental in remedying. There would thus be defeated the very purpose of the Shipping Act. An order capable of such a result could hardly be deemed lawful, especially when issued by the very agency which presumes to be proceeding in furtherance of that Act.

Point 3. The Contract Rate System is Lawful

(a) THE CONTRACT RATE SYSTEM IS IN ACCORD WITH THE RULE OF THE SUPREME COURT OF THE UNITED STATES.

Under the rule enunciated by this Court a difference in rates cannot be held illegal "unless it is shown that it is not justified by the cost of the respective services, by their values, or *by other transportation conditions.*" *United States* v. *Illinois Central Railway*, 263 U. S. 515, 523, 68 L. ed. 417, 425. This Court also stated:

> "The effort of a carrier *to obtain more business and to retain that which it has secured*, proceeds from the motive of self-interest, which is recognized as legiti-

> mate; and the fact that preferential rates were given only for this purpose relieves the carrier from any charge of favoritism or malice . . . To bring a difference in rates within the prohibition of Sec. 3,* it must be shown that the discrimination practised is unjust when measured by the transportation standard. (Emphasis supplied.)

Section 3 * of the Interstate Commerce Act was also involved in *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad Company*, 145 U. S. 263, 284, 36 L. ed. 699, 706, wherein this Court stated that—

> "... railway companies are only bound to give the same terms to all persons alike under the same conditions and circumstances, and that *any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charges . . .*" (Emphasis supplied.)

It is submitted that there is a presumption that a difference in rates is founded upon a difference in conditions and surrounding circumstances, and that the burden of proving that any undue preference or advantage results is upon the party who alleges it. The record herein shows by a very great preponderance of the evidence that no undue, unreasonable, or objectionable preference or advantage resulted from the operation of the contract rate system. However, the lower court concluded (R. 40) that such a condition existed merely because there were two rates—the contract and the non-contract, without endeavoring to show that the descrimination which is alleged to result from the existence of the two rates is "undue or unreasonable" as required if it is to be condemned under Section 16 of the Shipping Act.

---

* Sec. 3 of the Interstate Commerce Act (49 USC § 3) declares unlawful "any undue or unreasonable preference or advantage" or "any undue or unreasonable prejudice or disadvantage." To similar effect is Sec. 16 of the Shipping Act, the first paragraph of which makes it unlawful for any water carrier "to make or give any undue or unreasonable preference or advantage" or to subject any person "to any undue or unreasonable disadvantage."

There was *no attempt made to show that the difference between the contract rates and the non-contract rates is not justified.* On the contrary, it clearly appears that the contract rate, which is the basic rate, is charged *all* shippers who are willing to cooperate with the carriers by giving them all of the contract tonnage destined for the Pacific Coast via the Gulf and thus *assuring them of sufficient traffic to maintain a regular service, minimize waste or unused cargo space, and thus warrant the contract rate.* The Chairman of the Gulf Intercoastal Conference stated (R. 67) that stability of service is influenced by the execution of contracts because the Conference lines are thus "assured to a certain degree an approximate tonnage upon which they can bank their operations."

The non-contract rate, which includes an additional charge of ten cents per hundred pounds, applies only to that class of shippers who refuse to cooperate to maintain a regular and stable service and who prefer to speculate upon the possibility that a tramp steamer may be available with a cut rate when they have a shipment to move. If they lose by their speculation they have only themselves to blame.

The circumstances surrounding the application of the contract and non-contract rates are thus seen to be wholly dissimilar. It was only natural that the appellants should make an effort *to retain the business which they had secured.* That business was secured by the offer of stability of service and of rates in the Gulf intercoastal trade, and the retention of the business was made possible through the continuation of satisfactory service. This was, in turn, dependent upon the assurance provided to the appellants by the contracts with the shippers that adequate tonnage would be available to warrant the maintenance of the service. It is the contention of the appellants that *this change in circumstances over the unsatisfactory situation existing prior to the adoption of the contract rate system warranted the differential accorded to the shippers who made it possible,* and that this is contemplated by the rule enunciated by this Court.

(b) THE PRINCIPLE OF THE CONTRACT RATE SYSTEM HAS BEEN APPROVED BY THE UNITED STATES SHIPPING BOARD BUREAU.

The case of *W. T. Rawleigh Company* v. *Stoomvaart, et al.*, 1 U.S.S.B.B. 285, is almost identical with the case at bar. It involved a contract rate system under a conference agreement approved by the Shipping Board under Section 15 of the Shipping Act. The carriers in question were engaged in transportation between the Netherlands East Indies and the United States. The conference agreement provided, as does the agreement in the instant case, that any carrier regularly engaged in the trade should be admitted to membership upon the consent of a majority of the parties, and that admission should not be denied without just and reasonable cause. There were ten conference members, and there was one non-conference line also engaged in the trade. All eleven lines participated in the contracts.

The contracts were for a period of not more than one year, and both contract and non-contract rates were listed in tariffs, the higher non-contract rates being charged shippers who did not agree with the conference carriers to furnish them all of their shipments during the term of the contract. The contracts provided for shipments only in connection with traffic on which the lower rates were accorded.

Contract forms were offered all shippers in the trade, and all signed with the exception of the W. T. Rawleigh Company. That Company was the only shipper that complained about the system, just as in the instant case the only complaining shipper was one who had failed to sign a contract and was, therefore, required to pay the higher non-contract rate.

The objection to the contract system was that it subjected the complainant to undue and unreasonable prejudice and disadvantage in violation of the Shipping Act by exacting a higher rate from it for the same service which it accorded other shippers. The parties stipulated that no "particular transportation service" was furnished the complainant's

shipments which was not furnished the competing shippers who paid the lower contract rate. The evidence showed that the only disadvantage suffered by the complainant was with respect to the rate. There was no evidence that any other shipper had been preferred over complainant, or that it had been subjected to any unfair treatment in matters of space or other facilities, or that the complainant had been treated differently from any other shipper except as to the "rate disparity factor inherent in any contract rate practice."

The evidence further showed that "the purpose and ultimate effect of the contract rate system in the trade is to enable them to estimate the approximate volume of cargo that will move over their lines and to *insure stability of rates and regularity of service.*" It also appeared that the promise of the shippers to ship all of their tonnage via the contract carriers, together with the estimates which the shippers made of their tonnage requirements, aided the carriers in arranging sailings to fill the requirements of the trade and in a measure to avoid "uneconomical operation of excess ships."

The Board observed that the carriers had "the unqualified support of practically all other shippers than the complainant through the use of the contract rate system in its simple form." The Board then stated (p. 292):

> "The contract rate practice as a practice is not new, . . . It has presently almost universal practical application, . . . it is a system of rate application which finds acknowledged adaptability in ocean transportation.* An important attribute of it is equality of rate treatment as between large and small shippers."

The Board held that the practice of which the Rawleigh Company complained was not in violation of the Shipping Act, and, on July 6, 1933, dismissed the complaint, stating, in part, as follows (p. 293):

---

* The appellee has approved, under Section 15, more than 90 agreements for conferences comprised of water carriers in foreign commerce. *The majority of these groups employ some form of contract rate system.*

> "The Shipping Act, . . . does not forbid the contract rate practice as such; *nor has the Board ever considered that the practice as a practice contravenes any of the regulatory provisions of the Shipping statute.* . . . In this connection it is not persuasive that the respondents' practice is unlawful because of the absence of materially different service before and since the inauguration of such practice by them. Manifestly, a *basic reason for the inauguration of the contract rate practice was to secure protection to the carriers of the established services,* maintenance of which required heavy capital and overhead expenditures. These considerations, it would appear, justified adoption by the respondents of every reasonable measure, such as the contract rate practice per se, *to assure the stability of competitive conditions necessary for the continuance of the regularity and frequency of service required by shippers in the trade and which, except for introduction of such practice, might well have become impossible.*" (Emphasis supplied.)

No discussion is necessary to show the almost identical conditions existing in the *Rawleigh* case and that at bar. In both cases: (1) the conference agreements provided the same terms for admitting to the conferences all regular carriers in the trade; (2) the tariffs published both contract and non-contract rates; (3) some items were contractable and some were not, and the contracts, though promising exclusive patronage of participating carriers, obligated the shipper only as to contractable items; (4) contracts were offered to all shippers; (5) only one shipper complained against the system, and he had no contract and was required to pay the higher rate; (6) *the purpose and effect of the contract system was to insure regularity of service and stability of rates;* (7) contract shippers estimated their tonnage requirements as an aid to the carriers; (8) the objection to the system was that it resulted in undue and unreasonable prejudice and disadvantage; and (9) the only disadvantage was with respect to the rate.

The only real difference is that the *Rawleigh* case involved foreign commerce, whereas the appellants herein are en-

gaged only in intercoastal transportation. This is the difference upon which the Bureau relied when it refused to follow its decision in the *Rawleigh* case. It stated (see Exhibit B attached to the answer of appellee):

> "It is notorious that intercoastal transportation is not attended by many of the traffic and transportation circumstances attending transportation in foreign commerce." (R. 32-33.)

However, under the Shipping Act both foreign and intercoastal commerce are subject to the same tests as to lawfulness of rates, charges and practices. Furthermore, the record fails to disclose any facts, or any effort to adduce any facts, which would tend to show that any different considerations should apply to intercoastal commerce. If the Bureau has such facts available, which appellants deny, they should have been made a part of the record herein. As observed by this Court in the case of *Baltimore & Ohio Railroad Co.* v. *United States* (Chicago Junction case), 264 U. S. 258, 263, 68 L. ed. 667, 673:

> ". . . Facts conceivably known to the Commission but not put in evidence will not support an order . . ."

Upon the record, therefore, it must be concluded that the Bureau has taken an entirely inconsistent and arbitrary position in refusing to follow the *Rawleigh* case. Furthermore, the decision in that case is clearly in accord with the principle enunciated by this Court in *United States* v. *Illinois Central Railway* and *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad Company*, both supra.

Point 4. The Secretary of Commerce was without Authority to issue the Order in Question

The Secretary of Commerce was without authority to issue the order here under review because of the fact that Executive Order No. 6166, which abolished the United

States Shipping Board and transferred its functions to the Department of Commerce, was invalid and, therefore, conferred no authority upon the Secretary.

This same question is raised in the case of *Isbrandtsen-Moller Co., Inc.* v. *United States,* which was argued before this Court on January 15, 1937 (No. 307, October Term, 1936). That is also a proceeding to review an order of the Shipping Board, and was decided by a three-judge statutory court in the Southern District of New York, which held that the order of the President was valid and transferred the functions of the Shipping Board to the Department of Commerce, thus making the Secretary of Commerce the ultimate head of the Shipping Board. 14 F. Supp. 407.

By the time the case at bar comes before this Court for consideration, that of the *Isbrandtsen-Moller Company* will no doubt have been decided, and the validity of orders of the Secretary of Commerce in connection with the Shipping Board pursuant to the abolishment of that Board and the transfer of its functions to the Department of Commerce, under Executive Order No. 6166, will have been determined. Therefore, the appellants do not desire to offer any extended argument upon this subject, but they do wish to point out that the Shipping Board acts in a quasi-legislative capacity when it determines what rates or practices shall be applicable in the future, and when it makes investigations for the information of Congress; that it acts as an agent of the legislative department when it makes investigations for the information of the Interstate Commerce Commission; that it acts in a quasi-judicial capacity when it determines whether or not a complaining shipper is entitled to reparation because he contends that unreasonably high or unjustly discriminatory rates have been charged him in the past; and that there is no ground for holding that the Board is an *executive agency,* as required by the Economy Act (U.S.C., Title 5, §§ 125, 126) to make it subject to transfer or abolishment by the President. See *Humphrey's Executor* v. *United States,* 295 U. S. 602, 79 L. ed. 1611.

Therefore, Executive Order No. 6166 was invalid, at least insofar as it purported to affect the Shipping Board, and the functions of the latter could not be thereby abolished and transferred to the Secretary of Commerce. It necessarily follows that the order of the Secretary here in question was issued without authority.

VIII

Conclusion

The foregoing considerations demonstrate that the order of the Secretary of Commerce seeking to abolish appellants' contract rate system should be set aside as prayed in the bill for the following reasons:

(a) The adoption of the contract system was found necessary to secure protection to the carriers of the established service from the Gulf to the Pacific.

(b) The adoption of the contract system was found necessary to assure the stability of competitive conditions essential to the continuance of the regularity and frequency of service required by the shippers in the Gulf intercoastal trade.

(c) Under the contract system more than one-third of the port-to-port traffic from the Gulf to the Pacific, and all of the traffic which moves under joint rates with the railroads or the barge lines, or both, is available to any water carrier.

(d) Any carrier that actually engages * in the Gulf intercoastal service may become a member of the Gulf Intercoastal Conference and participate in the contract system.

---

* "There are no carriers operating regularly in the general cargo trade from the Gulf to the Pacific who are not members of the Gulf Intercoastal Conference. Only lines engaged in the Gulf intercoastal trade may become members of the Conference. If a carrier were actually engaged in the service, that is, actually put a ship down there, booked cargo, loaded it, filed his rates with the Shipping Board, and sailed the vessel, he would be qualified to apply for membership in the Conference." (R. 65.)

(e) The shippers in the Gulf intercoastal trade, with a minor exception, heartily endorse the contract rate system and do not want to see it abolished.

(f) No evidence, substantial or otherwise, was adduced by the appellee to show that the contract rate system resulted in "any undue or unreasonable preference or advantage" or in "any undue or unreasonable prejudice or disadvantage" whatsoever.

(g) Even though there were evidence to support the order in question, the Secretary of Commerce had no authority to issue it.

THEREFORE, the decree of the District Court of the United States for the District of Columbia should be reversed.

Respectfully submitted,

ELISHA HANSON,
ELIOT C. LOVETT,
729 Fifteenth Street,
Washington, D. C.,
FRANK LYON,
Shoreham Building,
Washington, D. C.,
Attorneys for Appellants.

INDEX

	Page
Opinion below	1
Jurisdiction	1–2
Questions presented	2
Statutes involved	3
Statement	4–8
Argument:	
I. The order of the Secretary of Commerce is supported by substantial evidence	8–26
II. The contract rate system embodied in the schedule ordered canceled cannot be sustained as a matter of law	26
A. There is no merit in appellants' contention that as a matter of law the contract rate system cannot be said to be unduly discriminatory	26–35
B. Previous determinations of the Shipping Board Bureau are not inconsistent with the decision that the contract rate system employed by appellants is unreasonably discriminatory	35–40
III. The Secretary of Commerce was lawfully authorized to exercise the powers formerly vested in the Shipping Board	40–42
Conclusion	42
Appendix	43–55

CITATIONS

Cases:	
Arizona Grocery v. *Atchison Ry.*, 284 U. S. 370	27
Atlanta, B. & C. R. Co., v. *United States*, 296 U. S. 33	11
Chicago & Alton R. R. Co. v. *Kirby*, 225 U. S. 155	32
Eden Mining Co. v. *Bluefields Fruit & S. S. Co.*, 1 U. S. S. B. 41	39, 40
Florida v. *United States*, 292 U. S. 1	11
Interstate Commerce Commission v. *B. & O. Railroad*, 145 U. S. 263	29
Interstate Commerce Commission v. *Louisville & Nashville R. R.*, 227 U. S. 88	12
Interstate Commerce Commission v. *Railway Co.*, 167 U. S. 479	33
Isbrandtsen-Moller Co. v. *United States*, No. 307, October Term, 1936	41

121374—37——1

Cases Continued. Page

Louisville & N. R. Co. v. United States, 282 U. S. 740 26
Manufacturers Ry. Co. v. United States, 246 U. S. 457 11, 14
Menacho v. Ward, 27 Fed. 529 (C. C. S. D. N. Y., 1886) 24, 33, 34
New Haven R. R. v. Interstate Com. Comm., 200 U. S. 361 32
W. T. Raleigh Co. v. Stoomvaart et al., 1 U. S. S. B. B. 285 35, 37
Seaboard Air Line Ry. Co. v. United States, 254 U. S. 57 11, 18
Tagg Bros. & Moorhead v. United States, 280 U. S. 420 35
Tift v. Southern Ry. Co., 123 Fed. 789 (C. C. Ga. 1903) 38
Union Pacific Railway v. Goodridge, 149 U. S. 680 32
United States v. Hanley, 71 Fed. 672 (D. C., N. D. Ill., 1896) 38
United States v. Illinois Cent. R. R., 263 U. S. 515 30, 31
United States v. Union Stock Yard, 226 U. S. 286 32
U. S. Navigation Co. v. Cunard S. S. Co., 284 U. S. 474 10, 32, 36
Virginian Ry. v. United States, 272 U. S. 658 11; 36
Western Chemical Co. v. United States, 271 U. S. 268 11
Western Union Tel. Co. v. Call Pub. Co., 181 U. S. 92 18

Statutes:

Act of October 22, 1913, c. 32, 38 Stat. 219 (U. S. C., Tit. 28, Secs. 47 and 48) 2, 4
Intercoastal Shipping Act, 1933 (Mar. 3, 1933, c. 199, 47 Stat. 1425; U. S. C., Tit. 46, Sec. 843) 3, 25, 50, 55
Sec. 2 4, 25, 50
Judicial Code:
Sec. 207 (U. S. C., Tit. 28, Sec. 41 (28)) 4
Sec. 208 (U. S. C., Tit. 28, Sec. 46) 4
Legislative Appropriation Act (Act of June 30, 1932, c. 314, 47 Stat. 414, Tit. IV, as amended) 2, 41
Merchant Marine Act, 1936 (June 29, 1936, c. 858, 49 Stat. 1985; U. S. C., Tit. 46, Sec. 1111) 7, 41
Sec. 204 (a) 7, 42
Shipping Act, 1916 (Sept. 7, 1916, c. 451, 39 Stat. 738; U. S. C., Tit. 46, Sec. 801) 2, 3, 4, 43–50
Sec. 14 19, 24, 30, 44
Sec. 15 24, 45
Sec. 16 7, 24, 32, 40, 47
Sec. 18 24, 48
Sec. 22 8, 49
Sec. 31 4, 50

Miscellaneous:

Constitution of the United States, Art. I, Sec. 8 4
Executive Order 6166 (June 10, 1933) 2, 7, 40, 42
General Order No. 2, United States Maritime Commission (Oct. 23, 1936) 7, 8

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 494

SWAYNE AND HOYT, LTD., GULF PACIFIC MAIL LINE, LTD., AND LUCKENBACH GULF STEAMSHIP COMPANY, INC., APPELLANTS

v.

THE UNITED STATES OF AMERICA

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court of the United States for the District of Columbia (R. 35) has not been reported.

JURISDICTION

The final decree of the District Court was entered July 15, 1936 (R. 47). The petition for appeal was filed August 14, 1936 (R. 48), and an order allowing appeal and fixing bond (R. 50) was entered the same day. Probable jurisdiction was noted by this Court on November 23, 1936.

Jurisdiction of this Court is invoked under section 31 of the Shipping Act, 1916, c. 451, September 7, 1916, 39 Stat. 738 (U. S. C., Tit. 46, Sec. 830) and the Act of October 22, 1913, c. 32, 38 Stat. 220 (U. S. C., Tit. 28, Sec. 47).

QUESTIONS PRESENTED

Appellants seek to enjoin the enforcement of an order issued by the Secretary of Commerce on January 21, 1936, requiring appellants to cancel certain schedules of rates for the carriage of freight from the Gulf of Mexico to the Pacific Coast on the ground that differentials contained therein were unduly and unreasonably preferential and prejudicial in violation of Section 16 of the Shipping Act, 1916. In issuing the order the Secretary exercised statutory authority originally conferred upon the United States Shipping Board by the Shipping Act, 1916. By Section 12 of Executive Order 6166, promulgated June 10, 1933, pursuant to the provisions of Title IV of the Legislative Appropriation Act of June 30, 1932, 47 Stat. 414, as amended, the United States Shipping Board was abolished and the functions of that body transferred to the Department of Commerce.

The questions presented by the appeal are:

(1) Whether the order issued by the Secretary was supported by substantial evidence and authorized by the provisions of the Shipping Act;

(2) Whether the Secretary of Commerce was legally authorized to exercise the powers formerly vested in the United States Shipping Board.

STATUTES INVOLVED

The pertinent provisions of the Shipping Act, 1916, c. 451, September 7, 1916, 39 Stat. 736 (U. S. C., Tit. 46, Sec. 820), and the Intercoastal Shipping Act, 1933, c. 199, March 3, 1933, 47 Stat. 1425 (U. S. C., Tit. 46, Sec. 843) are printed in the appendix, infra, pp. 43–55.

STATEMENT

This is an appeal from a decree of a specially constituted three-judge district court for the District of Columbia dismissing the bill of complaint in a suit for a preliminary and a permanent injunction restraining the enforcement of an order issued by the Secretary of Commerce on January 21, 1936 (R. 34–35).

The bill of complaint was filed by Swayne and Hoyt, Ltd., Gulf Pacific Mail Line, Ltd.; and Luckenbach Gulf Steamship Co., Inc., corporations engaged in intercoastal transportation of freight from United States ports on the Gulf of Mexico to ports on the Pacific Coast via the Panama Canal (R. 1–9). The appellants collectively constitute a voluntary organization known as the Gulf Intercoastal Conference, organized pursuant to the provisions of Section 15 of the Shipping Act. The agreement under which the Conference is now operating was approved by the United States Shipping Board Bureau of the Department of Commerce on March 28, 1934, in the exercise of authority conferred by Section 15 (R. 80–84). Suit was insti-

tuted by appellants in their individual rights and as members of the Conference (R. 1–2).

Appellants named the United States as respondent pursuant to the provisions of Section 31 of the Shipping Act, 1916, c. 451, 39 Stat. 738 (U. S. C., Tit. 46, Sec. 830), Section 208 of the Judicial Code (U. S. C., Tit. 28, Sec. 46), and the Act of October 22, 1913, c. 32, 38 Stat. 219 (U. S. C., Tit. 28, Sec. 48) (R. 2). Jurisdiction of the district court was invoked under Section 207 of the Judicial Code (U. S. C., Tit. 28, Sec. 41 (28)), the Shipping Act, 1916, and Article I, Section 8 of the Constitution of the United States, which gives Congress the power to regulate interstate and foreign commerce (R. 2).

Pursuant to the requirement of Section 2 of the Intercoastal Shipping Act, 1933, c. 199, March 3, 1933, 47 Stat. 1425 (U. S. C., Tit. 46, Sec. 844), the Conference filed with the United States Shipping Board its tariff issued May 25, 1933, publishing certain contract rates for the transportation of west bound freight.

In the case of certain commodities, rule 53 of the tariff provided for "contract rates" which were to be enjoyed by those shippers who agreed to use exclusively ships operated by conference members for all shipments of those commodities moving by water from ports on the Gulf of Mexico to ports on the Pacific Coast. The contract rates were 10 cents per 100 pounds or $2.00 per ton lower than

the rates charged shippers who did not make such contracts (R. 53–54). By the terms of such contracts, the contract of any shipper who made any shipment in violation of his agreement became void, and the shipper was thereupon required to pay to the transporting carrier the differential between "contract" and "non contract" rates upon all shipments previously transported under the contract (R. 55).

On February 19, 1934, upon order of the Secretary of Commerce, the Shipping Board Bureau of the Department of Commerce instituted an investigation of, among other matters, the lawfulness of the "contract rate" system employed by the Conference. The proceeding was designated "Intercoastal Investigation", Docket No. 126. After public hearings had been held and exceptions of the appellants to the proposed report of the examiner had been received, a report was issued by the Secretary of Commerce on July 3, 1935 (R. 17–25), accompanied by an order requiring appellants, on or before October 3, 1935, to refrain from charging shippers who had not entered into such contracts rates higher than those charged shippers who had entered into contractual agreements (R. 5–6; 13–14).

The contract rates in effect at the time of the issuance of the order expired October 2, 1935. On September 2, 1935, appellants filed new schedules, to be effective October 3, 1935, which continued the

"contract rate" system. On September 16, 1935, the Secretary vacated his order of July 3, 1935. At the same time he issued an order suspending the new tariff schedules until February 3, 1936, and ordered a second hearing concerning the lawfulness of the "contract rate" system. This proceeding was designated "Gulf Intercoastal Contract Rates," Docket No. 294 (R. 6, 14). A second hearing was held before an examiner on October 22 and 23, 1935, at which it was agreed by stipulation that the applicable portions of the record of Docket No. 126 should become part of the record of Docket No. 294. Appellants submitted evidence and filed exceptions to the proposed report of the examiner, and briefs in support thereof (R. 6, 14–15). On January 21, 1936, the Secretary issued a report in which he found the "contract rate" system to be unreasonably preferential and prejudicial in violation of Section 16 of the Shipping Act, 1916 (R. 25–34). The report was accompanied by an order requiring appellants to cancel the contract rates contained in the tariff of October 3, 1935 (R. 34–35). Appellants' petition for a reconsideration of the order of January 21, 1936, was denied on February 1, 1936 (R. 7, 15). On the same day the Secretary postponed the effective date of the order until April 1, 1936 (R. 7, 15).

On March 4, 1936, appellants instituted this suit in the District Court for the District of Columbia to set aside the order of January 21, 1936 (R. 1–9).

The bill of complaint alleged that the "contract rate" system did not violate the provisions of Section 16 of the Shipping Act, 1916, and that the Secretary was without authority to issue the order because Executive Order 6166 (June 10, 1933), which abolished the Shipping Board and transferred its functions to the Department of Commerce, was invalid (R. 7–8).

After a hearing before a statutory three-judge district court, the court on June 29, 1936, filed an opinion and dismissed the bill of complaint (R. 35–42). The final decree was entered on July 15, 1936 (R. 47). On October 26, 1936, the court filed its findings of fact and conclusions of law (R. 42–46). Appellants' petition for appeal, accompanied by an assignment of errors, was filed August 14, 1936 (R. 48–49), and an order allowing appeal and fixing bond was entered the same day (R. 50).

On the same date on which the district court rendered its opinion the Act of June 29, 1936, commonly known as the Merchant Marine Act, 1936 (c. 858, 49 Stat. 1985) became effective. That act created the United States Maritime Commission and transferred to it the functions of the Shipping Board Bureau of the Department of Commerce. By General Order No. 2, dated October 23, 1936, the United States Maritime Commission, pursuant to authority conferred by Section 204 (a) of the Merchant Marine Act, 1936, ordered that all orders and determinations issued by the Department

of Commerce, in the exercise of functions, powers, and duties transferred to the Commission by the Merchant Marine Act, 1936, and which were in effect at the time of that transfer should continue in effect until modified, terminated, superseded, or repealed by the Commission or by operation of law.[1] The effective date of the order requiring the abandonment of the contract rate system has been postponed until June 1, 1937. In the meantime appellants have permitted both "contract" and "non-contract" shippers to ship at "contract" rates.

ARGUMENT

I

The order of the Secretary of Commerce is supported by substantial evidence

The order issued by the Secretary of Commerce on January 21, 1936, provided (R. 34–35):[2]

> It appearing, That by Suspension Order No. 50, dated September 16, 1935, the Department entered upon a hearing concerning the lawfulness of the rates, charges, regulations, and practices stated in the schedules described in said order, and suspended the operation of said schedules until February 3, 1936; and

---

[1] General Order No. 2 was published in The Federal Register, No. 159, October 23, 1936, p. 1917.

[2] Section 22 of the Shipping Act, 1916, c. 451, 39 Stat. 736, provides authorization for the conduct of investigations of violations of the terms of the act and the entry of appropriate orders. See Appendix, *infra*, p. 49.

It further appearing, That a full investigation of the matters and things involved has been had, and that the Department, on the date hereof, has made and entered of record a report stating its conclusions and decisions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, That the respondents herein be, and they are hereby, notified and required to cancel said schedules on or before February 3, 1936, upon not less than one day's posting and filing in the manner required by law, and that this proceeding be discontinued; and

It is further ordered, That the cancellations herein ordered may be made in a consecutively numbered supplement to Agent C. Y. Roberts' Tariff SB–I No. 3, without observing the requirements of the Department's tariff rules.

(Signed) DANIEL C. ROPER,
Secretary of Commerce.

The report which accompanied the order (R. 25–34) contained a review of the evidence received at the hearing held upon the suspended rates, and the following findings of fact upon which the order was predicated (R. 34):

* * * it is clear that the real purpose of the suspended rates and rule is to prevent shippers from using the lines of other carriers, and to discourage all others from attempting to engage in intercoastal transportation from and to the Gulf.

> The department finds the contract rates system provided for in the schedules under suspension not justified by transportation conditions in the trade involved, and unduly and unreasonably preferential and prejudicial in violation of section 16 of the Shipping Act, 1916.

Section 16 of the Shipping Act 1916, c. 451, 39 Stat. 734, provides that it shall be unlawful for any common carrier by water "to make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Section 18 of the Shipping Act, 1916, requires every common carrier by water in interstate commerce to "observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto."

In *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 480, this Court said that "the Shipping Act is a comprehensive measure bearing a relation to common carriers by water substantially the same as that borne by the Interstate Commerce Act to interstate common carriers by land." It is established that a determination of the Interstate Commerce Commission concerning the reasonableness of rates will not be set aside unless it is shown that

the decision of the Commission was not supported by substantial evidence, or that the Commission acted arbitrarily or contrary to law. Where no irregularity appears in the proceedings of the Commission and it has committed no errors of law, its findings of fact made upon substantial evidence are conclusive, and the Court will not undertake to weigh the evidence upon which those findings are made. *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481–482; *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57, 62; *Western Chemical Co.* v. *United States*, 271 U. S. 268, 271; *Virginian Ry.* v. *United States*, 272 U. S. 658, 663; *Florida* v. *United States*, 292 U. S. 1, 12; *Atlanta, B. & C. R. Co.* v. *United States*, 296 U. S. 33, 38. No contention is made here that the hearing accorded appellants was not adequate, or that the order of the Secretary invades appellants' constitutional rights. The order merely requires the discontinuance of rate discrimination found to be unreasonable; it does not prescribe the rates to be charged by the appellants, and no question of confiscation arises. Apart from the question of the power of the Secretary to exercise the functions vested by the Shipping Act in the Shipping Board,[3] the only questions presented for the determination of this Court are whether there was substantial evidence to support the findings

[3] The question of the validity of the transfer of the functions of the former Shipping Board to the Department of Commerce is considered *infra*, pp. 40–42.

made by the Secretary and whether the order was authorized by the applicable provisions of the Shipping Act.

Appellants contend that the finding of the Secretary, and the opinion of the District Court, rest upon an unsupported assumption that the contract rate system employed by appellants was unreasonably discriminatory (Appellants' Brief, p. 15, 20). That contention finds no support in the record. In its opinion the court reviewed at some length the evidence upon which the order was based. Not only did the court find the order to be supported by substantial evidence, but it went farther and determined upon an independent analysis of the evidence that a violation of the Shipping Act had been established.[4] Specific findings of fact and conclusions of law made by the court sustain the order of the Secretary (R. 42–46). An examination of the evidence reveals that the findings of the Secretary and the decision of the District Court were clearly justified.[5]

---

[4] The Court stated (R. 40):

"Without deciding, therefore, to what extent we are bound by the finding of the Secretary that the practice is discriminatory and violates the provision of Section 16 of the Act, we are of opinion that the admitted and undisputed facts bring the practice within the condemnation of the statute."

[5] It was not a "finding without evidence" and the language used by this Court in *Interstate Commerce Commission* v. *Louisville & Nashville R. R.*, 227 U. S. 88, 91, condemning arbitrary administrative action, has no application to this case. Appellants' assignments of error do not attempt to raise any question as to the adequacy of these hearings (R. 48).

Appellants assert that the contract rate system involved no discrimination (Appellants' Brief, pp. 15, 17). Yet their statement of the evidence and of the question involved demonstrate that the system did involve the application of two different sets of rates for the performance of the same service. One tariff schedule was applied to shippers who had entered into contracts undertaking to patronize appellants exclusively in certain shipments, and another schedule of higher rates was applied to shippers who had not entered into such contracts (Appellants' Brief, pp. 11, 12). It cannot be questioned, therefore, that the contract rate system did involve a differentiation in the treatment accorded two classes of shippers.[6] Whether the application of different rates to these two classes of shippers may fairly be said to constitute an unreasonable

---

[6] The differentiation is shown clearly by the following excerpt from Appellants' Rule 53, governing the execution of contracts for the exclusive patronage of appellants (R. 53):

"Rule 53. Procedure in Connection with Execution of Contracts at Contract Rates.

"(a) Where specific reference is made to this rule in individual commodity items in this tariff, the rates named in such items are contract rates and in the absence of contracts as provided for in this rule, the rates on such commodities will be ten cents per one hundred pounds or two dollars per ton of two thousand pounds higher than the rates named in such items."

Rule 53 requires that a contract executed by appellants whereby they agree to transport freight at "contract rates" in exchange for the undertaking of the shipper to patronize them exclusively shall contain the following provision for

discrimination is the only question presented in determining whether the order of the Secretary was justified by the evidence and authorized by the Shipping Act.[7]

The finding of the Secretary that the contract rate system was unduly and unreasonably preferential and prejudicial is amply sustained by the evidence. The differential between "contract" and "non-contract" rates for the carriage of the same commodities, between the same ports, was shown to be an arbitrary and unwarranted discrimination between two groups of shippers. The Chairman of the Gulf Intercoastal Conference admitted at the hearing that the same service is rendered by the carrier irrespective of whether a particular con-

---

enforcing the compliance of the shipper with the terms of the contract (R. 55):

"If the Shipper shall make any shipments in violation hereof, this agreement shall immediately become null and void as to all future shipments, and thereupon the Shipper shall be liable to the transporting Carriers for payment of additional freight on all commodities theretofore shipped with such Carriers since the execution of this agreement, in the amount of the difference between the tariff contract rate or rates and the tariff non-contract rate or rates of the transporting carriers in force on such commodities at the time of such shipment."

[7] It is urged that there exists a presumption that "a difference in rates is founded upon a difference in conditions and surrounding circumstances" (Appellants' Brief, p. 20). Whether or not such a procedural rule obtains in a hearing ordered by the Secretary, it is clear that before this Court it is for appellants to demonstrate that the order of January 21, 1936, was not supported by substantial evidence. See *Manufacturers Ry.* v. *United States*, 246 U. S. 457, 481.

signment moves under "contract" or "non-contract" rates (R. 65). The physical work performed in one class of shipment is the same as that performed in the other. No greater cost is incurred by the carrier in moving a shipment under "non-contract" than under "contract" rates. On the contrary, any difference in cost would favor the consignment moving under "non-contract" rates because some cost is incurred in handling correspondence relating to the contracts (R. 65). The differential of ten cents for each hundred pounds which is charged shippers who have not executed contracts to patronize Conference lines exclusively was conceded to be an arbitrary figure which represented no additional benefit received by the shipper who pays the higher rate, nor any additional burden borne by the carrier (R. 65). The differential is in effect a penalty which must be paid by the shipper who does not desire to commit to appellants his future consignments, and who desires to remain at liberty to patronize non-conference carriers (R. 66).

It does not follow from the fact that a particular commodity, by action of the Conference, becomes the subject of "contract rates" that there is a reduction in the rate for that item. Rather, the previous rate becomes the "contract rate", and shippers who do not choose to enter into contracts must thereafter pay a higher rate (R. 67). If it be assumed that the previous rate was fair and com-

pensatory, there can be no justification for the arbitrary imposition of a higher rate upon a class of shippers simply because they are not disposed to commit themselves for the future. Whether a commodity is to carry a "contract rate" is decided by the Conference. Usually those items which move regularly and in great volume are selected, although other factors do influence the determination (R. 64).[8] Under these conditions the arbitrary imposition of higher rates upon shippers who wish to retain their freedom to patronize whatever carrier they choose is clearly an undue preference of "contract" shippers, and unreasonably prejudicial of "non-contract" shippers.

Appellants assert that "non-contract" shippers are not unduly prejudiced by the contract rate system because it lies within their power to remove the discrimination against them by executing contracts with the Conference (Appellants' Brief, p. 16). The very statement of that proposition reveals the iniquity of the practice. Equality of treatment which can be secured only through the surrender of the right of the shipper to patronize in the future whatever carrier it pleases obviously is not the equality required by Section 16 of the Shipping Act, 1916. The discrimination against "non-contract" shippers is not rendered qualita-

[8] Although shippers occasionally request that "contract rates" be established in specific items (R. 64), it does not appear that shippers are consulted by the Conference in establishing tariff schedules.

tively more reasonable by the fact that not every commodity is subject to a "contract rate", or by the fact that the shipper could employ routes of transportation other than water carriers operating from Gulf ports (Appellants' Brief, p. 17). The statement that only 382 of the 1,137 items covered by the suspended tariff carried "contract rates" does not reveal the scope of the contract rate system. The fact that the items selected for "contract rates" are those which move regularly and in great volume (R. 64) diminishes the field within which "contract" shippers may select carriers other than members of the Conference.

It is argued that the fact that most of appellants' patrons favor the contract rate system demonstrates "the *absence* of undue prejudice or disadvantage, or of discrimination of any kind" (Appellants' Brief, p. 18). Yet approval of the system is not universal among shippers from the Gulf ports. It was conceded that on one occasion shippers had requested that a commodity be taken from the contract lists in order that they might avail themselves of the services of another carrier at lower rates (R. 64). The Traffic Manager of the International Paper Company stated that if rates, instead of being fixed by the Conference, were determined on the basis of reasonable and free competition, "that would be the healthier situation" (R. 58). The National Cast Iron Pipe Company opposed the system because it had found it impos-

sible to operate thereunder; the company felt that as a result it had been effectively excluded from the Gulf (R. 76) and it now ships from South Atlantic instead of Gulf ports (R. 77). A representative of the Dulien Steel Products Company termed the system "annoying and troublesome as well as unnecessary." He asserted his company operated in competition with others which shipped from Gulf ports and could not afford to ship at "non-contract" rates when his competitors secured "contract" rates (R. 60). The American Cyanamid Company and the Crystal Springs Bleachery also opposed the contract rate system (R. 73).

Whether the contract rate system is unreasonably discriminatory cannot be judged by the number of shippers who, as a matter of policy, favor its continuance. A rate schedule which discriminates unreasonably against a single shipper falls as clearly within the prohibition of Section 16 of the Shipping Act as does one which offends against a great number of shippers. Whether the cancelled schedule is unreasonable must be determined by the fundamental rule to which the rates of all common carriers must conform—identical services must bear identical rates, and differentiation in rates must be reasonably related to difference in service. See *Western Union Tel. Co.* v. *Call Pub. Co.*, 181 U. S. 92, 100; *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57, 62.

The terms "unreasonable preference" and "unreasonable prejudice" employed in Section 16 of the Shipping Act should be read in the light of the prohibitions contained in Section 14. That section in effect condemns rate preferences made to any shipper on the basis of the volume of freight offered. Manifestly this provision is designed to protect the shipper of small quantities of freight. Section 14 provides also that it is unlawful for any carrier to discriminate against any shipper because that shipper has patronized another carrier. It was obviously the purpose of Congress in enacting this provision to prevent any carrier from coercing exclusive patronage through the imposition of penalties in the form of higher rates charged shippers who patronized other carriers. Viewed in the light of these objectives it is clear that Section 16 was designed to prohibit the kind of discrimination embodied in appellants' contract rate system.

The suspended tariff schedules also discriminate unreasonably against carriers which are not members of the Conference. At present no carriers other than appellants are regularly engaged in intercoastal trade between Gulf ports and ports on the Pacific Coast (R. 65). There is no real competition among the members of the Conference. Of its three members, only two provide westbound service from Gulf ports (R. 63), and these two alternate in providing weekly service (R. 58). By

binding shippers to patronize the Conference lines exclusively in order to avoid rate discrimination, appellants effectively preclude competition by other lines. A representative of the Conference conceded that the contract system did give its members a competitive advantage with respect to traffic moving from Gulf ports (R. 64) and that its existence did present an obstacle to the successful operation of a competing steamship line (R. 65). The traffic manager of the United States Pipe & Foundry Company, who favored the continuance of the contract system, asserted that so far as the Conference was concerned one of the purposes of the contract system was to force traffic to the Conference lines (R. 57). Officers of two non-Conference steamship lines asserted that it was impossible for other lines to engage in business from the Gulf ports while appellants had by contract secured for themselves the greater portion of the available trade (R. 67, 69). As a result of the operation of the contract system the appellants enjoy a monopoly of the Gulf trade (R. 58, 67). In the period of a year and a half which preceded the first suspension order of the Secretary, more than 63 percent of the total westbound port-to-port tonnage moved under contract rates. In the same time less than one percent of the tonnage which was entitled to a "contract rate" moved at the higher rate because it was not covered by contracts (R. 60).

It is contended that the contract rate system does not discriminate unreasonably against other carriers because under the rules of the Gulf Intercoastal Conference "any carrier regularly engaged in the Gulf intercoastal trade is eligible for membership" in the Conference (Appellants' Brief, p. 17). But a carrier has the right to operate freely without joining the Conference if it desires to do so, and it is no answer to the charge of discrimination to say that a carrier may avoid the effects of discrimination by abandoning that right. Quite apart from this consideration, the right to enter the Conference is largely lacking in substance. The provision of the Gulf Intercoastal Conference Agreement relating to membership (R. 83) is construed by the Conference to mean that a carrier, to be eligible for membership, must actually be engaged regularly in the Gulf intercoastal trade. It must place a ship in operation, book cargo, file rates, and sail the vessel (R. 65). The impossibility of securing sufficient tonnage in the face of the contracts for exclusive patronage held by appellants effectively prevents other carriers from complying with the rule for admission to the Conference (R. 67, 69). The Nelson Steamship Company on two occasions applied for membership in the Conference, but it was in each instance denied admittance because it was unable to meet the requirements imposed (R. 65, 68). Had it not been for the existence of the contract rate system that company

would be employing a number of its idle steamers in the Gulf trade (R. 68).

Appellants' suggestion that any carrier is free to compete in the transportation of those commodities for which no "contract rates" are prescribed (Appellants' Brief, pp. 17–18) affords no protection for non-Conference carriers. The tonnage which moves under "contract rates" is admittedly that which moves most regularly and in greatest volume (R. 64). The remaining tonnage which is shipped through the Gulf ports under "non-contract" rates is not sufficient in volume to permit a competing line to operate profitably (R. 67–68, 69).

Not only does the contract rate operate to discriminate unreasonably among shippers and carriers, but it also operates to favor unduly some Gulf ports over others. Thus it appears that while the system assures a flow of traffic through the port of Mobile (R. 57), it hinders the development of the Lake Charles district because new shipping lines are excluded (R. 75). Moreover, the contract rate system operates to divert trade from Gulf ports to ports in other localities. Traffic which formerly moved through Gulf ports but is excluded by the operation of the system now moves through South Atlantic ports (R. 77).

Appellants rely most strongly in their argument in support of the contract rate system on the premise that it has "been conducive to the maintenance of an efficient and regular service between United

States Gulf and Pacific Coast ports", and that it has remedied the chaotic conditions which existed in the Gulf prior to its inception (R. 19). Most of the testimony introduced by appellants in support of the system was calculated to show that shippers prefer the stability of rates which obtains thereunder (R. 57, 58, 59, 61, 71, 72). While the stabilization of rates and the maintenance of an efficient merchant marine are unquestionably laudable objectives, these ends cannot justify practices which are in direct conflict with the provisions of the Shipping Act by which Congress sought to protect shippers, carriers, and ports from unjust and unreasonable discrimination.[9]

The Shipping Act was designed, as appellants state, to encourage the creation of a merchant ma-

[9] The District Court stated, with reference to appellants' attempt to justify the discrimination embodied in the contract rate system (R. 40–41):

They insist that the preference to their contract shippers is not unreasonable, is offered to all alike, and is reciprocally beneficial—beneficial to the carrier because it insures it a constant flow of remunerative business and beneficial to the shipper because it insures him stability of rate and regularity of service. And all of this may be true. But the unreasonableness of the contract is in the fact that it insures to one shipper who is willing to tie himself up by contract the same service at a cheaper rate than the carrier is willing to extend to another shipper who is not, and thus is effective to coerce all shippers to abandon the advantages of competition or pay a penalty. It is likewise subject to condemnation for this reason.—The rate charged the contract shippers obviously is, from the carrier's point of view, a remunerative rate. This being true, the exaction of a higher rate by 10¢

rine to meet the requirements of the commerce of the United States (Appellants' Brief, pp. 18–19). It was for this purpose that Congress by Section 15 sanctioned agreements and combinations which otherwise would have constituted direct violations of the antitrust laws. Yet Sections 14, 16, and 18 show that great care was taken in drafting the Act to insure that the privileges granted should not be employed to accomplish the evils toward which the antitrust laws were directed.

If the Shipping Act, 1916 does not make effective provision for the recognized needs of an efficient American merchant marine, the remedy, as stated by the District Court,[10] must be accomplished by act of Congress rather than by resort to the

---

per cwt. from all other shippers is an undue and unreasonable exaction. It is in effect a penalty.

Not only is this true, but the contract is likewise prejudicial to the "locality", i. e., the Gulf territory, because the tendency is to exclude all competition and create a monopoly in favor of the Conference carriers. The effect of the monopoly is to destroy the checks and balances imposed by free and unrestrained competition; and we cannot doubt that, in forbidding any water carrier from subjecting any locality to unreasonable prejudice or disadvantage, Congress intended to include any act the tendency of which would be to destroy the restraints which competition imposes.

[10] In its opinion the District Court stated (R. 41):

"Here the result of the contract system is a complete, effective, and perpetual bar restraining all other carriers from attempting to serve the public as carriers between Gulf ports and the west coast. Such an imposed monopoly was unreasonable discrimination at common law.—Menacho v. Ward, 27 Fed. 529. It is no less so, under the provisions

courts in an attempt to nullify the safeguards contained in the Act.

That Congress has not been insensible to the necessities of common carriers by water is indicated by legislation enacted subsequent to the Shipping Act, 1916. Direct provision is made in the Intercoastal Shipping Act, 1933, c. 199, 47 Stat. 1425, to prevent such rate wars as those which had theretofore led to chaotic conditions in the Gulf intercoastal trade. Section 2 of that Act requires every common carrier in intercoastal commerce to file with the Shipping Board its rate schedules. Such schedules may be changed only by filing with the Board new schedules which shall not become effective until thirty days have passed. Power is vested in the Board to reject any schedule which is not in consonance with the regulatory provisions of the section. The Chairman of the Gulf Intercoastal Conference and another witness who testified in favor of the contract rate system conceded that the passage of this Act has to some degree eliminated the conditions which led to the adoption

---

of the federal statute. In saying this we are by no means unmindful of the problems of the American shipowner. That these problems are pressing to the point of emergency, is obvious to those who have watched the steady decline of American shipping since the period of the World War; and that the problem requires special treatment from Congress is, we believe, universally admitted. The increase and maintenance of the American merchant marine is a subject of national concern, indeed of national safety, but the remedy is political and not judicial."

of the contract rate system (R. 56, 64). Another witness agreed that rate stability would be insured by the Act (R. 77). That the contract rate system is not the sole effective solution to the problems of carriers by water is shown by the testimony of several shippers who stated that they had experienced no difficulty with respect to the service or rates of lines operating from Atlantic ports which do not employ the contract rate system (R. 59, 61).

II

The contract rate system embodied in the schedule ordered canceled cannot be sustained as a matter of law

A. There is no merit in appellants' contention that as a matter of law the contract rate system cannot be said to be unduly discriminatory.

In the third point of their brief, appellants appear to contend that as a matter of law the contract rate system cannot be unreasonably discriminatory because the stability of rates alleged to result from the system constitutes a legal justification for the difference in treatment accorded "contract" and "non-contract" shippers (Appellants' Brief, pp. 19–21).[11]

Appellants' assertion that no attempt was made "*to show that the difference between the contract*

[11] Appellants admit that the mere fact that they have for a long period used the contract rate system does not "clothe it with immunity" (Appellants' Brief, p. 15). Cf. *Louisville & N. R. Co.* v. *United States*, 282 U. S. 740, 759. While it is contended that the filing of the rates embodied in the contract rate system gave them the force of a statute (Ap-

rates and the non-contract rates is not justified" (Appellants' Brief, p. 21) is palpably without foundation. In the report which accompanied his order, the Secretary, after a review of the evidence, found that the contract rate system was "not justified by transportation conditions in the trade involved, and unduly and unreasonably preferential and prejudicial in violation of section 16 of the Shipping Act, 1916" (R. 34). In this finding the district court concurred (R. 42–46).

The evidence upon which the finding of the Secretary was made has been discussed, *supra*, pp. 12–22. It shows that the differential contained in the contract rate system was based upon no difference in service rendered to the shipper, or upon any difference in cost to the carrier, but that it was an arbitrary exaction levied upon shippers to compel them to patronize the Conference lines. Indeed, appellants make no serious attempt to justify the system on the ground that the differential had any relation to the service performed. Instead, they assert that "the circumstances surrounding the application of the contract and non-contract rates" are dissimilar (Appellants' Brief, p. 21).

---

pellants' Brief, p. 15), it is clear that the mere fact of filing made them legal rates only until appropriate proceedings were taken by the Secretary to determine their lawfulness. In *Arizona Grocery* v. *Atchison Ry.*, 284 U. S. 370, 384, this Court distinguished between "legal" rates and "lawful" rates. On filing, rates became "legal", but ". . . the legal rate was not made by the statute the lawful rate—it was lawful only if it was reasonable."

Whether there were differences in the circumstances under which "contract" and "non-contract" rates were charged is a question of fact to be determined in the first instance by the Secretary. Only if his conclusion finds no reasonable support in the evidence will it be set aside by the courts. It is submitted that the finding of the Secretary was not only justified, but that it was, as determined by the district court (R. 40), required by the evidence.

The "dissimilarity of circumstances" upon which appellants rely is said to consist in the assurance received by the appellants in contracts executed by shippers of *"sufficient traffic to maintain a regular service, minimize waste or unused cargo space, and thus warrant the contract rate"* (Appellants' Brief, p. 21). Aside from the question of the capacity of the contracts to produce this result,[12] clearly that circumstance affords no legal

[12] The contracts executed by "contract" shippers contain merely an *estimate* of the approximate number of carloads of commodities of all descriptions subject to "contract rates" to be shipped during the period of six months or a year during which the contract is effective (R. 54). The shipper does not undertake to provide any specific quantity of tonnage in consideration for the receipt of a lower rate. The contract does not prescribe the rate at which the commodities will be delivered to the carrier. It gives no indication of the precise time during the contract period of a year or six months at which the bulk of the commodities will be shipped. The incapacity of the contracts to afford the carrier accurate advance information concerning the flow of "contract" tonnage is indicated by the proviso contained

basis for rate discrimination. Efficiency of operation which is achieved through the employment of coercive tactics to induce patronage by shippers and through the exclusion of competing carriers can never provide a reasonable ground for differences in rates.[13]

Neither of the two cases on which appellants rely afford legal support for the contract rate system. In *Interstate Commerce Commission* v. *B. & O. Railroad,* 145 U. S. 263, this Court held that the practice of a railroad in issuing "party-rate" tickets, under which a group of individuals might travel on a single ticket at a reduced rate, did not unduly discriminate against individual

---

in the contracts to the effect that the carriers undertake to transport the goods of the shipper only when cargo space is available at the time request is made therefor by the "contract shipper" (R. 54). In view of these considerations there is ample ground for concluding that the advantage derived by the carrier from the contract rate system lies in exclusion of competing carriers rather than in any resulting greater efficiency in the allocation of cargo space.

[13] Appellants seek to justify the higher rate imposed upon "non-contract" shippers by saying that it "applies only to that class of shippers who refuse to cooperate to maintain a regular and stable service and who prefer to speculate upon the possibility that a tramp steamer may be available with a cut rate when they have a shipment to move. If they lose by their speculation they have only themselves to blame" (Appellants' Brief, p. 21). It is submitted that "non-contract" shippers are fully entitled to patronize whatever carrier they may select, and that appellants cannot lawfully compel them to "cooperate" with the Conference lines by the imposition of penalties for failure to patronize those lines exclusively.

travelers who were required to pay the regular fare. The circumstance which was held to justify rate differentiation was the increased travel which was induced by such tickets. No suggestion is made by appellants that the contract rate system is calculated to induce patrons to ship a greater volume of freight than they would normally ship.[14] The "contract rates" are not reduced rates; where a commodity becomes subject to such rates, the only change is the imposition of a penalty upon shippers who decline to commit their patronge to appellants exclusively (R. 67).

United States v. *Illinois Cent. R. R.*, 263 U. S. 515, is the other decision cited by appellants in support of their contention. In that case a shipper alleged that it had been subjected to undue discrimination in freight rates. The shipper was situated at a non-competitive point on an independent branch line in an area from which a "blanket rate" was effective on through freight moving to northern markets. To maintain the "blanket rate" the defendant railroad habitually absorbed the charges of connecting branch lines within the area. In the case of the plaintiff the defendant declined to absorb the charges of the branch line and imposed a

[14] If the contract rate system did constitute a reduction of rates on the basis of quantity of tonnage offered, it would come into conflict with Section 14 of the Shipping Act, which prohibits the making of any contract whereby any shipper is accorded preference on the basis of the volume of freight offered.

higher rate than that charged other shippers of the area. Such differentiation was held to constitute an undue discrimination. In that case the carrier sought to justify the discrimination in rates on the ground that where competition did not so require, it should not be compelled to absorb the allowance made to the branch line for its services. In sustaining the determination of the Interstate Commerce Commission that the discrimination was unwarranted, the Court stated (pp. 523–525):

> The effort of a carrier to obtain business, and to retain that which it had secured, proceeds from the motive of self-interest which is recognized as legitimate; and the fact that preferential rates were given only for this purpose relieves the carrier from any charge of favoritism or malice. But preferences may inflict undue prejudice though the carrier's motives in granting them are honest. *Interstate Commerce Commission* v. *Chicago Great Western Ry. Co.*, 209 U. S. 108, 122. *Self-interest of the carrier may not override the requirement of equality in rates.* [Italics supplied.]
>
> * * * * *
>
> The innocent character of the discrimination practiced by the Illinois Central was not established, as a matter of law, by showing that the preferential rate was given to others for the purpose of developing traffic on the carrier's own lines or of securing competitive traffic. These were factors to

be considered by the Commission; but they did not preclude a finding that the discrimination practiced is unjust. Such was the law even before Transportation Act 1920.

Likewise, in this case it cannot be said as a matter of law that the Secretary erred in finding the contract rate system to be unduly discriminatory. The Secretary was bound to consider not only the increased efficiency in the operation of the Conference lines which might be attributed to the contract rate system, but also its capacity to curtail the freedom of shippers to patronize other carriers, and the attendant deprivation of other carriers of their right to compete with appellants in the Gulf intercoastal trade. It was the purpose of Congress in enacting the Interstate Commerce Act to insure equality of treatment for all shippers by rail. *Union Pacific Railway* v. *Goodridge,* 149 U. S. 680, 690–691; *New Haven R. R.* v. *Interstate Com. Comm.,* 200 U. S. 361, 391; *Chicago & Alton R. R. Co.* v. *Kirby,* 225 U. S. 155, 166; *United States* v. *Union Stock Yard,* 226 U. S. 286, 307. The same protection was extended to shippers by water by the Shipping Act, 1916. *U. S. Navigation Co.* v. *Cunard S. S. Co.,* 284 U. S. 474, 480–481.

Even under the principles of the common law such discrimination as that practiced here by appellants has been held to be unreasonable.[15] The

[15] The requirement of reasonableness contained in Section 16 of the Shipping Act, 1916, is declaratory of the common

case of *Menacho* v. *Ward*, 27 Fed. 529 (C. C. S. D. N. Y., 1886), presents a question almost identical to that involved here. There suits were instituted by shippers to restrain two steamship lines from habitually imposing higher rates upon shippers who declined to patronize the defendants exclusively than were charged shippers who agreed to give defendants their entire trade. As in this case, the defendants operated under a joint traffic agreement and were the only carriers regularly engaged in the transportation of freight from New York to Cuba. The defendant lines, like appellants in this case, sought to justify the practice of rate discrimination on the ground it had been found necessary in order to secure sufficient patronage. The Court placed upon defendants the duty to demonstrate the reasonableness of the discrimination in rates, saying (p. 532):

> The fact that the carrier charges some less than others for the same service is merely

---

law. It has been held that the Interstate Commerce Act, insofar as it prohibited unjust and unreasonable rates, was an adoption by Congress of common law principles. *Interstate Commerce Commission* v. *Railway Co.*, 167 U. S. 479, 494; *Tift* v. *Southern Ry. Co.*, 123 Fed. 789, 792 (C. C. Ga., 1903); *United States* v. *Hanley*, 71 Fed. 672, 673 (D. C., N. D. Ill., 1896). Appellants have pointed out that Section 16 of the Shipping Act, 1916, employs language which is virtually identical with that of section 3 of the Interstate Commerce Act (U. S. C., Tit. 39, Sec. 3), which declares unlawful "any undue or unreasonable preference or advantage" or "any undue or unreasonable prejudice or disadvantage" (Appellants' Brief, p. 20).

> evidence for the latter, tending to show that he charges them too much; but, when it appears that the charges are greater than those ordinarily and uniformly made to others for similar services, the fact is not only competent evidence against the carrier, but cogent evidence, and shifts upon him the burden of justifying the exceptional charge. The estimate placed by a party upon the value of his own services of property is always sufficient, against him, to establish the real value; but it has augmented probative force, and is almost conclusive against him, when he has adopted it in a long-continued and extensive course of business dealings, and held it out as a fixed and notorious standard for the information of the public.

The Court determined that the difference in rates could not be justified as discounts made to regular patrons for shipments in quantity because, as here, the discrimination bore no relation to the quantity of trade offered by the individual shipper, but depended entirely upon his employment of defendants exclusively. In granting injunctive relief to the shippers, the Court said (p. 534):

> The vice of the discrimination here is that it is calculated to coerce all those who have occasion to employ common carriers between New York and Cuba from employing such agencies as may offer. Its tendency is to deprive the public of their legitimate opportunities to obtain carriage on the best terms they can. If it is tolerated, it

will result practically in giving the defendants a monopoly of the carrying trade between these places. *Manifestly it is enforced by the defendants in order to discourage all others from attempting to serve the public as carriers between these places. Such discrimination is not only unreasonable, but is odious.* [Italics supplied.]

B. Previous determinations of the Shipping Board Bureau are not inconsistent with the decision that the contract rate system employed by appellants is unreasonably discriminatory

Appellants contend that because the Shipping Board Bureau of the Department of Commerce has, in an earlier proceeding, approved the use of a contract rate system by carriers engaged in foreign commerce, it is required to approve the appellants' employment of a contract rate system in intercoastal trade (Appellants' Brief, pp. 22–25). Assuming for the moment that the situation presented in *W. T. Rawleigh Company* v. *Stoomvaart, et al.*, 1 U. S. S. B. B. 285, was analogous to that here involved, appellants err in contending that a determination of the Shipping Board Bureau establishes a conclusive precedent which cannot be modified or overruled by later decisions. An order issued by an administrative officer prescribing rates is not *res judicata*, and it may be superseded by a later order. *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 445. Likewise, the finding of a regulatory body as to the reasonableness of rates establishes no binding precedent.

Thus in *Virginian Ry.* v. *United States,* 272 U. S. 658, in answer to the contention that an order of the Interstate Commerce Commission was inconsistent with an earlier determination, this Court stated (pp. 665–666):

> The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal "informed by experience." *Illinois Central R. R. Co.* v. *Interstate Commerce Commission,* 206 U. S. 441, 454. This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, *or with the alleged inconsistency with findings made in other proceedings before it. Interstate Commerce Commission* v. *Union Pacific R. R. Co.,* 222 U. S. 541. (Italics supplied.)

This Court has declined to take jurisdiction of a suit instituted under the antitrust laws against steamship lines which had entered into a combination, on the ground that a previous decision of the Shipping Board that a similar combination was illegal did not conclusively establish the illegality of the combination in question. *U. S. Navigation Co.* v. *Cunard S. S. Co.,* 284 U. S. 474. In holding that the question should be presented first to the Shipping Board, the Court said (p. 488):

> Whatever might be the rule to be applied under other circumstances, we are of opinion that in the state of the present record the ordinary primary jurisdiction of the board has not been superseded by its decision in the

> *Eden* case. To hold otherwise would be to create the doubtful, and perhaps dangerous, precedent that a decision of the board in respect of one agreement definitely establishes that the rule of that decision must, without more, be applied to all other agreements alleged to be of a similar character, although it may turn out upon investigation that the allegations are not warranted, or the facts and circumstances of and surrounding the transaction are so wholly different as to afford ground for a different result.

Turning to a consideration of the decision of the Bureau in the *Rawleigh* case, it becomes obvious on an examination of the report of the Secretary (R. 33) that it can provide no precedent for the determination of this case because the circumstances of that case differ widely from those here involved. The contract rate system involved in the *Rawleigh* case was employed in foreign, rather than in intercoastal, commerce. This fact alone constitutes a fundamental basis for distinction. As pointed out by the Secretary (R. 33), no such regulatory provisions as those contained in the Intercoastal Shipping Act, 1933, exist with respect to foreign commerce. Stability of trade conditions must be maintained, if at all, by cooperation among carriers. It is the presence of foreign competition which introduces uncertainty in foreign commerce. Unlike intercoastal carriers, those engaged in foreign commerce must compete with foreign carriers.

The very existence of such American carriers depends upon their ability to meet effectively the competition of foreign carriers. Whatever may be the situation presented in foreign commerce, there can be no justification for the use made by appellants of the contract rate system in the field of intercoastal commerce. Even within the field of foreign commerce, the Secretary has given no blanket approval of the contract rate system.[16]

A further distinction observed by the Secretary (R. 33) is to be noted in the fact that in this case there exists virtually no competition among the appellants (R. 58, 63), while in the *Rawleigh* case there were eleven carriers competing for the business of shippers. The monopolistic condition which exists in the Gulf intercoastal trade was, therefore, not involved in that case. Clearly that factor is one of great importance in determining whether rate differentiation occasions undue hardship since in its presence the equalizing effect of wholesome competition is absent.[17]

---

[16] In the report which accompanied his order the Secretary stated (R. 33):

"It should be understood that the department is not here sanctioning all contract rate systems in foreign commerce. Whether any such system is lawful is a question which must be determined by the facts in each case."

[17] It was in recognition of this fact that the District Court stated in its opinion (R. 41):

An analogy more closely resembling the present case is afforded by the decision of the United States Shipping Board in *Eden Mining Company* v. *Bluefields Fruit & S. S. Co.*, 1 U. S. S. B. 41. In that case shippers complained to the Board concerning the practice of the defendant carrier of charging shippers who declined to enter into contracts to patronize the defendant exclusively higher rates than those charged shippers who did execute such contracts for the transportation of freight from New Orleans to Nicaragua. As in the present case, such contracts were available to all shippers, and the "contract rate" was granted without regard to the volume of freight offered by the shipper. The defendant carrier was the only line which operated regularly between New Orleans and Nicaragua, a circumstance which also resembles the present case. Like the appellants here, the defendant sought to justify the discrimination in rates on the ground that by reason of the contracts for exclusive patron-

"The effect of the monopoly is to destroy the checks and balances imposed by free and unrestrained competition; and we can not doubt that, in forbidding any water carrier from subjecting any locality to unreasonable prejudice or disadvantage, Congress intended to include any act the tendency of which would be to destroy the restraints which competition imposes."

age it was able to adjust the service supplied to the tonnage available with a greater degree of efficiency than would be possible without such contracts. In deciding that the contract rate system employed by defendant constituted a violation of Section 16 of the Shipping Act, 1916, the Board rejected the contention that all shippers were treated equally because all were afforded equal opportunity to contract, saying (p. 46):

> Under the statute, the complainants, as members of the shipping public, were entitled to have their shipments carried at the same rates as other patrons who received identical service. This right attached to each individual transportation transaction as such, and was not to be predicated upon any condition imposed by the respondent restricting the complainants' freedom of choice as to what carrier or carriers they should elect to patronize in connection with subsequent shipments.

After concluding that the practice of defendant constituted an unjust discrimination between shippers, the complaint was dismissed upon a showing that the violations had been discontinued.

III

The Secretary of Commerce was lawfully authorized to exercise the powers formerly vested in the Shipping Board

Appellants contend that Executive Order 6166, which abolished the United States Shipping Board

and transferred its functions to the Department of Commerce, was invalid (Appellants' Brief, pp. 25–27). The basis for this contention appears to be that the Shipping Board was not an executive agency within the meaning of Title IV of the Legislative Appropriation Act of June 30, 1932, and that therefore that Act did not authorize the President to abolish the Shipping Board and transfer its functions to the Department of Commerce (Appellants' Brief, p. 26). The same contention was urged upon this Court in *Isbrandtsen-Moller Co., Inc.*, v. *United States*, No. 307, October Term, 1936, and was answered in the brief submitted on behalf of the United States in that case. The Court is respectfully referred to that brief, and particularly to pages 38–61 thereof.

In summarizing their contention on this point, appellants completely ignore the fact that irrespective of what Congress may have originally intended when it enacted Title IV it has subsequently, by a series of laws, recognized and approved the action of the President in abolishing the Shipping Board and transferring its functions to the Department of Commerce.[18] The latest expression of congressional approval is found in the Merchant Marine Act, 1936, 49 Stat. 1987, which specifically refers to the functions of the United

[18] These statutes are described and discussed on pages 52–61 of the brief submitted on behalf of the United States in *Isbrandtsen-Moller Co. Inc.* v. *United States*, No. 307, October Term, 1936.

States Shipping Board as "now vested in the Department of Commerce pursuant to section 12 of the President's Executive order of June 10, 1933."[19]

CONCLUSION

For the foregoing reasons the decree of the District Court of the United States for the District of Columbia should be affirmed.

Respectfully submitted.

STANLEY REED,
Solicitor General.
GOLDEN W. BELL,
Assistant Solicitor General.
HUGH B. COX,
WENDELL BERGE,
Special Assistants to the Attorney General.
JOHN C. HERBERG,
MAURICE L. A. GELLIS,
Special Attorneys.
R. H. HALLETT,
Assistant Counsel,
United States Maritime Commission.

FEBRUARY 1937.

---

[19] Section 204 (a) of the Merchant Marine Act, 1936, follows:

"Section 204. (a) All the functions, powers, and duties vested in the former United States Shipping Board by the Shipping Act, 1916, the Merchant Marine Act, 1920, the Merchant Marine Act, 1928, the Intercoastal Shipping Act, 1933, and amendments to those Acts, and now vested in the Department of Commerce pursuant to section 12 of the President's Executive order of June 10, 1933, are hereby transferred to the United States Maritime Commission; * * *."

APPENDIX

SHIPPING ACT, 1916

The pertinent provisions of the Shipping Act, 1916 (September 7, 1916, c. 451, 39 Stat. 738, as amended; U. S. C., Tit. 46, Secs. 801, *et seq.*) provide:

[Section 1]

Section 801. Terms defined. When used in this chapter:

* * * * *

The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.

* * * * *

* * * (Sept. 7, 1916, c. 451, § 1, 39 Stat. 728; July 15, 1918, c. 152, § 1, 40 Stat. 900.)

* * * * *

[SECTION 14]

§ 812. Rebates and discriminations by carriers by water prohibited; use of "fighting ship". No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

First. Pay, or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow, a deferred rebate to any shipper. The term "deferred rebate" in this chapter means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this chapter means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or

resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense (Sept. 7, 1916, c. 451, § 14, 39 Stat. 733; June 5, 1920, c. 250, § 20, 41 Stat. 996).

* * * * *

[SECTION 15]

§ 814. *Contracts between carriers filed with board.*—Every common carrier by water, or other person subject to this chapter, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or

restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1 to 11, inclusive, and section 15 of chapter 1, of Title 15, Commerce and Trade, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action (Sept. 7, 1916, c. 451, § 15, 39 Stat. 733).

[Section 16]

§ 815. *Discriminatory acts prohibited.*—It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Second. To allow any person to obtain transportation for property at less than the regular rates then established and enforced on the line of such carrier, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this chapter (Sept. 7, 1916, c. 451, § 16, 39 Stat. 734).

* * * * *

[Section 18]

§ 817. *Carriers to establish, observe, and enforce reasonable rates and regulations.*— Every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

Every such carrier shall file with the board and keep open to public inspection, in the form and manner and within the time prescribed by the board, the maximum rates, fares, and charges for or in connection with transportation between points on its own route; and if a through route has been established, the maximum rates, fares, and charges for or in connection with transportation between points on its own route and points on the route of any other carrier by water.

No such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section, except with the approval of the board and after ten days' public notice in the form and manner prescribed by the board, stating the increase proposed to be made; but the board for good cause shown may waive such notice.

Whenever the board finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carrier is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice (Sept. 7, 1916, c. 451, § 18, 39 Stat. 735).

* * * * *

[Section 22]

§ *821. Complaints to board and investigations.*—Any person may file with the board a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the board, satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this chapter, investigate it in such manner and by such means, and make such order as it deems proper. The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this chapter (Sept. 7, 1916, c. 451, § 22, 39 Stat. 736).

* * * * *

[Section 31]

§ 830. Venue and procedure in suits to enforce, suspend, or set aside orders.—The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the board shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties (Sept. 7, 1916, c. 451, § 31, 39 Stat. 738).

INTERCOASTAL SHIPPING ACT, 1933

The pertinent provisions of the Intercoastal Shipping Act, 1933 (March 3, 1933, c. 199, 47 Stat. 1427; U. S. C., Tit. 46, Secs. 843 *et seq.*), provide:

[Section 1]

§ 843. Definitions. When used in this chapter—

The term "common carrier by water in intercoastal commerce" for the purposes of this chapter shall include every common and contract carrier by water engaged in the transportation for hire of passengers or property between one State of the United States and any other State of the United States by way of the Panama Canal (Mar. 3, 1933, c. 199, § 1, 47 Stat. 1425).

[Section 2]

§ 844. Schedule of rates; filing; posting; penalties for violations.—Every common carrier by water in intercoastal commerce shall file with the United States Shipping

Board and keep open to public inspection schedules showing all the rates, fares, and charges for or in connection with transportation between intercoastal points on its own route; and, if a through route has been established, all the rates, fares, and charges for or in connection with transportation between intercoastal points on its own route and points on the route of any other carrier by water. The schedules filed and kept open to public inspection as aforesaid by any such carrier shall plainly show the places between which passengers and/or freight will be carried, and shall contain the classification of freight and of passenger accommodations in force, and shall also state separately each terminal or other charge, privilege, or facility, granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, or charges, or the value of the service rendered to the passenger, consignor, or consignee. Such carriers in establishing and fixing rates, fares, or charges may make equal rates, fares, or charges for similar service between all ports of origin and all ports of destination, and it shall be unlawful for any such carrier, either directly or indirectly, through the medium of any agreement, conference, association, understanding, or otherwise, to prevent or attempt to prevent any such carrier from extending service to any publicly owned terminal located on any improvement project authorized by the Congress at the same rates which it charges at its nearest regular port of call. Such schedules shall be plainly printed, and copies shall be kept posted in a public and conspicuous place at every wharf, dock, and office of such carrier where pas-

sengers or freight are received for transportation, in such manner that they shall be readily accessible to the public and can be conveniently inspected.

No change shall be made in the rates, fares, or charges, or classifications, rules, or regulations, which have been filed and posted as required by this section, except by the publication, filing, and posting as aforesaid of a new schedule or schedules which shall become effective not earlier than thirty days after date of posting and filing thereof with the board, and such schedule or schedules shall plainly show the changes proposed to be made in the schedule or schedules then in force and the time when the rates, fares, charges, classifications, rules, or regulations as changed are to become effective: *Provided*, That the board may, in its discretion and for good cause, allow changes upon less than the period of thirty days herein specified: *And provided further*, That schedules or changes which provide for extension of actual service to additional ports at rates of said carrier already in effect for similar service at the nearest port of call to said additional ports shall become effective immediately upon notice to the board.

From and after ninety days following March 3, 1933, no person shall engage in transportation as a common carrier by water in intercoastal commerce unless and until its schedules as provided by this section have been duly and properly filed and posted; nor shall any common carrier by water in intercoastal commerce charge or demand or collect or receive a greater or less or different compensation for the transportation of passengers or property or for any

service in connection therewith than the rates, fares, and/or charges which are specified in its schedules filed with the board and duly posted and in effect at the time; nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such schedules.

The board shall by regulations prescribe the form and manner in which the schedules required by this section shall be published, filed, and posted; and the board is authorized to reject any schedule filed with it which is not in consonance with this section and with such regulations. Any schedule so rejected by the board shall be void and its use shall be unlawful.

Any violation of any provision of this section by a common carrier by water in intercoastal commerce shall be punished by a fine of not less than $1,000 nor more than $5,000 for each act of violation and/or for each day such violation continues, to be recovered by the United States in a civil action (Mar. 3, 1933, c. 199, § 2, 47 Stat. 1425).

[Section 3]

§ 845. Same; changes in rates; hearings on new schedules; suspension of rates pending hearing. Whenever there shall be filed with the board any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the board shall have, and it is hereby given, authority, either upon complaint or upon its

own initiative without complaint, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice: *Provided, however,* That there shall be no suspension of a tariff schedule or service which extends to additional ports, actual service at rates of said carrier for similar service already in effect at the nearest port of call to said additional port.

Pending such hearing and the decision thereon the board, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than four months beyond the time when it would otherwise go into effect; and after full hearing whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the board may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period. The board shall give preference to the hearing and decision of such questions and decide the same as speedily as possible. Nothing contained herein shall be construed to empower the

board affirmatively to fix specific rates (Mar. 3, 1933, c. 199, § 3, 47 Stat. 1426).

* * * * *

[Section 5]

§ 847. *Application of chapter 23 to intercoastal shipping.* The provisions of chapter 23, and as amended prior to this chapter, shall in all respects, except as amended by this chapter, continue to be applicable to common carriers by water in intercoastal commerce (Mar. 3, 1933, c. 199, § 5, 47 Stat. 1427).

U. S. GOVERNMENT PRINTING OFFICE: 1937

SUPREME COURT OF THE UNITED STATES.

No. 494.—October Term, 1936.

Swayne and Hoyt, Ltd., Gulf Pacific Mail Line, Ltd., and Luckenbach Gulf Steamship Company, Inc., Appellants, *vs.* The United States of America.	Appeal from the District Court of the United States for the District of Columbia.

[March 1, 1937.]

Mr. Justice Stone delivered the opinion of the Court.

Appellants are steamship corporations engaged in the transportation of freight through the Panama Canal between United States ports on the Gulf of Mexico and on the Pacific Coast. They constitute the Gulf Intercoastal Conference, which operates under an agreement, approved March 28, 1934, by the United States Shipping Board Bureau of the Department of Commerce, as provided by § 15 of the Shipping Act of 1916, 39 Stat. 733, 46 U. S. C. § 814. On May 25, 1933, the Conference, in conformity to the Intercoastal Shipping Act of 1932, § 2, 47 Stat. 1425, 46 U. S. C. § 844, filed with the United States Shipping Board Bureau a new tariff, effective June 2, 1933, publishing certain rates for the transportation of freight, westbound from coast to coast.

The tariff, continuing the contract system in use by the Conference, provided for "contract rates" for specified commodities, to be enjoyed by shippers who agree with the Conference, by written contract, to make all their shipments of those commodities by vessel of the Conference members for a specified period. The tariff rates on the same commodities for shippers not entering into contracts were $2.00 per ton higher than the contract rates. In 1934, the Secretary of Commerce ordered an investigation by the Shipping Board Bureau of the lawfulness of the contract rate system (see § 22 of the Shipping Act, 39 Stat. 736, 46 U. S. C. § 821, and § 3 of the Intercoastal Shipping Act of 1933, 47 Stat. 1426, 46 U. S. C. § 845). The ensuing report condemned the discrimination, and on July 3, 1935, the Secretary ordered the appellants to cease charging the higher rates to shippers who had not entered into contracts.

In September of that year appellants filed new rate schedules, effective October 3, 1935, which continued the contract rate system. Thereupon the Secretary vacated his order of July 3rd and made an order suspending the schedules and directing a second hearing concerning the lawfulness of the contract rate system. On this hearing new evidence was introduced, and relevant portions of the evidence adduced on the previous hearing were spread upon the record. In a report reviewing this record, the Secretary found that the "real purpose of the suspended rates . . . is to prevent shippers from using the lines of other carriers and to discourage all others from attempting to engage in intercoastal transportation from and to the Gulf." He accordingly found the rates unduly prejudicial and ordered their cancellation.

The present suit was brought in the District Court for the District of Columbia, three judges sitting, to set aside the order of the Secretary as without his statutory authority and because not supported by substantial evidence. From the decree of the district court sustaining the Secretary's order, — F. Supp. —, the case comes here on appeal under § 31 of the Shipping Act, 39 Stat. 738, 46 U. S. C. § 830, and the Act of October 22, 1913, 38 Stat. 220, 28 U. S. C. § 47. Appellants here, as in the court below, have assigned as error that the Secretary was without authority to make the order under review because the Executive Order of June 10, 1933, No. 6166, § 12, which abolished the United States Shipping Board and transferred its functions to the Department of Commerce, was without constitutional and legislative authority, and because the findings and order of the Secretary were without support in the evidence.

First. Since the appeal was taken, the contention that the transfer to the Secretary, by Executive Order (No. 6166, § 12), of powers conferred by the Shipping Act on the United States Shipping Board, was unauthorized by the terms of Title 4 of the Legislative Appropriation Act of June 30, 1932, 47 Stat. 413, as amended, 47 Stat. 1517, has been put at rest by the decision of this Court in *Isbrandtsen-Moller Co., Inc.* v. *United States, et al.*, February 1, 1937. There we held that the failure of Congress, if any, to express its will in the earlier act had been remedied by various later acts mentioning the Executive Order, and making appropriations to the Department of Commerce for payment of the expenses of carrying

out the provisions of the Shipping Act,[1] and by § 204 (a) of the Merchant Marine Act of June 29, 1936, 49 Stat. 1985, which referred to functions of the former Shipping Board as "now vested in the Department of Commerce pursuant to § 12 of the President's Executive Order No. 6166," and transferred them to the newly-constituted United States Maritime Commission.

To dispose of further contentions also urged here, that Congress was without constitutional power to delegate to the President authority to determine whether the transfer should be effected, and that he did not exercise it in a constitutional manner, the Court found it enough that the order of the Secretary, which the Maritime Commission had continued in effect, had "determined no rights and prescribed no duties" of the carrier. The rate order here is of a different sort and we face the question previously reserved. It is unnecessary now to pass on the efficacy of the transfer by Executive Order, for we are of opinion that as Congress itself had power to abolish the Shipping Board and to require its functions to be performed by the Secretary, it had power to recognize and validate his performance of those functions even though their attempted transfer by Executive Order was ineffectual.

It is well settled that Congress may, by enactment not otherwise inappropriate, "ratify . . . acts which it might have authorized," see *Mattingly* v. *District of Columbia*, 97 U. S. 687, 690, and give the force of law to official action unauthorized when taken. *Wilson* v. *Shaw*, 204 U. S. 24, 32; *United States* v. *Heinzen*, 206 U. S. 370, 382; *Hamilton* v. *Dillin*, 21 Wall. 73, 96; *Tiaco* v. *Forbes*, 228 U. S. 549, 556; *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226, 232; *Charlotte Harbor Ry.* v. *Welles*, 260 U. S. 8, 11; *Hodges* v. *Snyder*, 261 U. S. 600, 603. And we think that Congress, irrespective of any doctrine of ratification, has, by the enactment of the statutes mentioned, in effect confirmed and approved the exercise by the Secretary of powers originally conferred on the Shipping Board.

The mere fact that the validation is retroactive in its operation is not enough, in the circumstances of this case, to render it ineffective. In *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 429, this Court recognized that a distinction must be taken "between a bare attempt of the legislature retroactively to create liabilities for transactions

[1] Act of April 7, 1934, 48 Stat. 529, 566; Act of March 22, 1935, 49 Stat. 67, 99; Act of May 15, 1936, 49 Stat. 1309, 1345.

. . . fully consummated in the past . . . and the case of a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice." And see *Hecht* v. *Malley,* 265 U. S. 144, 164. Here the retroactive application of the curative act impairs no substantial right or equity of appellants; their rights to an administrative hearing and determination, and to a judicial review, have been as fully preserved as if the act had been adopted at the date of the Executive Order. The proceedings were conducted by the Secretary in the name of the United States, cf. *United States* v. *Heinzen, supra,* at 385, by virtue of the 1932 Act and the Executive Order. The consequences of the validating statute are free of the elements of novelty and surprise which have led to condemnation, as unreasonable and arbitrary, of other retroactive legislation. See *Milliken* v. *United States,* 283 U. S. 15, 21; *United States* v. *Hudson,* decided January 11, 1937. We conclude that the Secretary's exercise of the powers conferred on the Shipping Board has been sanctioned by Congress.

Second. Section 16 of the Shipping Act declares that "it shall be unlawful for a common carrier by water," subject to the Act, "to make or give any undue or unreasonable preference or advantage to any particular person, locality or description of traffic in any respect whatsoever or to subject any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."[2] The differential between appellants' rates on commodities transported under contract and the rates on the same commodities for non-contract shippers was prima facie discriminatory since the two rates were charged for identical services and facilities, and the narrow issue presented to the Secretary for decision was whether, in the conditions affecting the traffic involved, the discrimination was undue or unreasonable.

As pointed out by this Court in *United States Navigation Co.* v. *Cunard S. S. Co., Ltd.,* 284 U. S. 474, the provisions of the

[2] See also Shipping Act, § 15, 39 Stat. 733, 46 U. S. C. § 814 (the Shipping Board may cancel or modify any agreement between a carrier and another carrier or person subject to the Act, which it finds to be unjustly discriminatory); § 17, 39 Stat. 734, 46 U. S. C. § 816 (the Board may order discontinuance of discriminatory rates charged by carriers in foreign commerce); § 18, 39 Stat. 735, 46 U. S. C. § 817 (whenever the Board finds that any classification is unjust or unreasonable, it may order a just and reasonable one enforced).

Shipping Act which confer upon the Shipping Board authority over rates and practices of carriers by water, and prescribe the mode of its exercise, closely parallel those of the Interstate Commerce Act establishing the corresponding relations of the Interstate Commerce Commission to carriers by rail. Both have set up an administrative agency to whose informed judgment and discretion Congress has committed the determination of questions of fact, on the basis of which it is authorized to make administrative orders.

Such determinations will not be set aside by courts if there is evidence to support them. Even though, upon a consideration of all the evidence, a court might reach a different conclusion, it is not authorized to substitute its own for the administrative judgment. See *Manufacturers Ry.* v. *United States,* 246 U. S. 457, 481; *Pennsylvania Co.* v. *United States,* 236 U. S. 351; cf. *United States Navigation Co.* v. *Cunard S. S. Co., Ltd., supra,* 484. Whether a discrimination in rates or services of a carrier is undue or unreasonable has always been regarded as peculiarly a question committed to the judgment of the administrative body, based upon an appreciation of all the facts and circumstances affecting the traffic. *Manufacturers Ry.* v. *United States, supra; Pennsylvania Co.* v. *United States, supra,* 361; *Seaboard Air Line Ry. Co.* v. *United States,* 254 U. S. 57, 62; *Pennsylvania R. R. Co.* v. *International Coal Co.,* 230 U. S. 184, 196; *Nashville Ry.* v. *Tennessee,* 262 U. S. 318, 322.

In determining whether the present discrimination was undue or unreasonable the Secretary was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether, as appellants urge, it operated to secure stability of rates with consequent stability of service, and, so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter. This was clearly recognized in the report upon which the present order is based. It states that the danger of cut-throat competition was lessened by § 3 of the Intercoastal Shipping Act of 1933, and that the contract system tends to create a monopoly. In view of the assurance of reasonable rate stability afforded by the Act of 1933, the Secretary concluded that this was the real purpose of the contract rate.

Before the enactment of the Shipping Act in 1916, there was no Congressional regulation of rates and practices of water carriers.

By § 16 of the Act, the carriers were required to file only their maximum rates, which left them free to indulge in rate wars. Under §§ 2 and 3 of the Intercoastal Shipping Act of 1933, they are required to file schedules specifying their rates, which are subject to change only on thirty days' notice, and to examination by the Board as to their lawfulness, with power in it to suspend the rate pending investigation. We cannot say that cut-rates for "tramp" and "distressed" tonnage, which, according to appellants' witnesses, are the principal menace to rate stability, would not be substantially deterred by these requirements. The chairman of the Conference admitted that the 1933 statute "has to a certain extent eliminated the condition necessitating the contract rate system." In addition may be mentioned the testimony of shippers who favored the contract rate system, but admitted that they had had no difficulty with the stability of the service in their shipments from Atlantic ports, where the conferences have not adopted a contract system. We think there was evidence from which the Secretary could reasonably conclude that there was little need for a contract rate system to assure stability of service.

On the other hand, there was substantial evidence from which the Secretary could infer that the contract rate system would tend to give to the Conference carriers a monopoly by excluding competition from new lines. The secretary of the Conference testified that approximately 64% of the west-bound port to port tonnage moved under the contract rate. Representatives of lines not members of the Conference stated that the tonnage left was not enough to make the operation of a new line profitable, and that the contract system precluded the employment of their idle steamers in the Gulf trade. The Conference chairman admitted that it would "not be easy" for a new line to enter the Gulf service because it "is now adequately tonnaged", and that the contract system restricted the amount of available tonnage. He suggested that a competing line might be able to get tonnage if it offered as much as a 10% rate reduction, but admitted that it probably could not operate successfully at such a rate.

It also appeared, contrary to the assertion of appellants, that competing lines were not free to enter the Conference. By the provisions of the Conference agreement, it is prerequisite to admission that the applicant shall be engaged in the general cargo trade from

the Gulf to the Pacific. There was testimony that the Conference had denied admission to a line because it did not have an established service in the Gulf, although at the time when it applied for membership it had idle vessels and "offices and facilities" for conducting the business. It is an admissible inference from the evidence that a new line, to secure admission to the Conference, must either be able successfully to compete with the Conference lines at the start, notwithstanding the restriction of the contract rate, or must subject itself to a loss before it can qualify for admission.

There was thus evidence before the Secretary which tended to show that the contract rate system, by reason of the conditions prevailing in the traffic, had established a practical monopoly of cargos moving from the Gulf ports to ports on the Pacific coast, from which competing carriers were excluded by the provisions of the Conference agreement, except on terms which were practically prohibitive, and that, since the adoption of the Intercoastal Shipping Act of 1933, stability of service, which appellants urge as justification for the system, could be secured without a contract rate. As the Secretary has interpreted the evidence, the operation of the contract system, in the circumstances of this case, does not differ substantially from that of "deferred rebates" outlawed in both foreign and coastwise shipping by § 14 of the Shipping Act, 39 Stat. 733, 46 U. S. C. § 812.[3]

---

[3] Section 14 of the Shipping Act defines the term "deferred rebate" as "a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has compiled with the terms of the rebate agreement or arrangement."

The report of the House Committee on Merchant Marine & Fisheries, H. R. Doc. 805, 63rd Cong., 2d Sess. (1914), recommended (p. 307) the prohibition of deferred rebates, adopted in § 14 of the Shipping Act, because it operated to tie shippers to a group of lines for successive periods, and because the system "is unnecessary to secure excellence and regularity of service, a considerable number of conferences being operated today without this feature." See, e. g., pp. 103-105, 200. The Committee recognized that the exclusive contract system does not necessarily tie up the shipper as completely as "deferred rebates", since it does not place him in "continual dependence" on the carrier by forcing his exclusive patronage for one contract period under threats of forfeit of differentials accumulated during a previous contract period. Accordingly the Committee did not condemn the contract system completely. Cf. W. T. Rawleigh Co. *v.* Stoomvaart, et al., 1 U. S. S. B. 285. The policy of the statute may properly be applied where, as in the circumstances of this case, the contract system must be taken as actually operating to effect a monopoly. Cf. Eden Mining Co. *v.* Bluefields Fruit & S. S. Co., 1 U. S. S. B. 41.

Even though, as appellants seem to argue, the evidence may lend itself to support a different inference, we are without authority to substitute our judgment for that of the Secretatry that the discrimination was unreasonable.

Affirmed.

Mr. Justice SUTHERLAND dissents.

A true copy.

Test:

Clerk, Supreme Court, U. S.